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INTERNATIONAL GOVERNMENT AND DIPLOMATIC PRIVILEGE

Articles 104 and 105 of the Charter of the United Nations provide that that Organisation shall enjoy in the territory of each of its Members such legal capacity and such privileges and immunities as are necessary for the fulfilment of its purposes, and that representatives of the Members and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation. Article 105 deputes to the General Assembly the duty of elaborating these provisions by way of proposing conventions to the Members or otherwise. In pursuance of these articles, the Fifth Committee of the Executive Committee of the Preparatory Commission was directed to prepare studies and make recommendations on the question of privileges and immunities.[1] The resulting report was endorsed by the Executive Committee and by the Preparatory Commission, and was referred by the latter body to the General Assembly with a reminder that the obligations resulting from Articles 104 and 105 operated from the date of entry into force of the Charter and thus even before any regulatory action upon them was taken by the General Assembly.[2] The most significant of the considerations thus brought to the notice of the General Assembly were as follows: that the privileges and immunities of the United Nations and of the various specialised international agencies contemplated by Article 57 of the Charter should as far as possible be 'unified'; that the grant of full diplomatic immunity should be confined to cases where it was really justified, any excess of privilege being as detrimental to the interests of the recipient international organisation as to those of the countries called upon to grant it, and that such privileges as might be granted should belong to the organisation concerned rather than to the individual affected, and should be

[1] *Report by the Executive Committee to the Preparatory Commission* (H.M.S.O., November, 1945), Part IV: Terms of Reference of Committees, p. 134.
[2] *Ibid.*, Part III: Statement of Recommendations, Para. E, p. 10.

capable of waiver by the former.[3] Although significant, none of these recommendations was new, and together they represent merely what was already the theory and practice of the matter in the time of the League of Nations. What was novel, however, was the inclination evinced in the report to disapprove the principle that the general rule rendering the salaries of international officials immune from national taxation is subject to an exception where such officials are nationals of the taxing State. Exactly how novel this view is may be seen from the fact that the principle in question is adopted in the constitutions even of such entirely new international organisations as the International Monetary Fund[4] and the International Bank for Reconstruction and Development.[5] The reason adduced for its advocacy was that the irregular exercise by individual governments of their discretion to tax or not to tax such of their nationals as are international officials is productive of an inequality of circumstance amongst officials of equal status which has led to 'certain administrative difficulties'[6] and has raised the question whether the United Nations should not pay compensating allowances to those of its officials who are taxed in order to restore equality.

When the General Assembly met for the first time two committees became concerned with the matter under discussion. In the first place the Sixth Committee (Legal) was charged specifically with the question as to how Articles 104 and 105 of the Charter were to be elaborated. In furtherance of this task, that Committee produced two draft conventions, the first relating to privileges and immunities in general, and the second to the headquarters of the United Nations. The scheme envisaged by the former fell considerably short of the general rule laid down in the Covenant, whereunder all officials of the League were, without exception, expressed to be accorded diplomatic status.[7] For, although that status was

[3] Cf. the '*Observations on Relations with the Specialised Agencies*' (of the Eighth Committee). These Observations, not coming strictly within its terms of reference, were passed by the Executive Committee to the Preparatory Commission without either approval or disapproval. They contain suggestions in part identical with those of the Fifth Committee: *ibid.*, Part III, Ch. VIII, s. 2, para. 38, p. 108.

[4] Articles of Agreement, Art. IX, s. 8 (ii), contained in *Final Act of the United Nations Monetary and Financial Conference*, Cmd. 6456, p. 27.

[5] Articles of Agreement, Art. VII, s. 8 (ii), *loc. cit.*, p. 61.

[6] Presumably those explained by the Minister of State in the House of Commons debate on the Diplomatic Privileges Bill, *i.e.*, difficulties of posting arising from considerations of comparative hardship. Cf. *Hansard*, vol. 424, col. 647.

[7] Cf. Art. 4 (7) of the League Covenant. For an account of the manner in which this provision was implemented, see J. Rey, *Commentaire du Pacte de la Société des Nations*, 291 ff.; and for accounts of the situation in regard to other inter-

proposed for the higher officials, a feeling pervaded the deliberations of the Committee, as it had done those of the Fifth Committee of the Executive Committee, that so great a degree of immunity was not essential in all cases. But the Fifth Committee of the General Assembly (Administrative and Budgetary Matters) became also involved in the matter through the raising of the question of tax exemption during the discussion on the salaries of the Secretary-General and other high officials. The United States delegate was largely responsible for the controversy aroused, which recurred when it came to laying down principles regarding staff salaries in general. He did not contest the general principle of the immunity of international civil servants from taxation, but he did point out that the question whether American citizens in the service of the United Nations would be exempt from income taxes depended upon the existence of treaty stipulations providing therefor, and further, upon the willingness of Congress to amend the existing tax legislation.[8] His deduction was that all the General Assembly could do until these matters became clear was to construct a salary scale without reference to the possibility of exemption. In taking this attitude the United States was virtually in a minority of one, but its opinion, as that of the State in whose territory the headquarters of the United Nations is to be established, was, and is, nevertheless, important. All the delegates were, moreover, united in regarding the creation of a class of persons privileged in the matter of taxation as highly undesirable. There was, therefore, no little support for the proposal of a staff contribution scheme. The principle of such a scheme, the idea of which seems to have originated with the I.L.O. but which is now adopted also by PICAO, is that all employees, in order to preserve equality amongst them, shall pay to the funds of the employing organisation a contribution in lieu of tax, those paying national taxes diminishing their contributions by the amount thereof. But no final decision was reached, and the whole problem was referred to the Secretary-General for further study.

The General Assembly ultimately approved the convention

national organisations, see F. Rey, *Les Immunites des Fonctionnaires internationaux* (1928) and J. Secretan in 16 B.Y.I.L. (1935) 56; see also Hudson, *The Permanent Court of International Justice* (1934) 313 ff. By way of summary of the matter it may be said that, notwithstanding the formal words of Art. 4 (7) of the Covenant, the grant of full diplomatic immunity was in practice confined to higher officials and that the principle of 'nationality discrimination', especially in regard to taxation, was otherwise rigidly enforced.

[8] W. H. C. Laves and F. O. Wilcox, *The First Meeting of the General Assembly*, 40 A.J.I.L. (1946) 346, 368 ff.

on privileges and immunities drafted by its Sixth Committee, but not without discussion. Reservations against the clause thereof which would exempt officials from national service obligations were entered by the U.S.S.R., Byelorussia, the Ukraine, the United States and the Argentine, and against that which would exempt their official salaries from taxation by the United States.[9] The Attorney-General of the United Kingdom, who was a member of the delegation of that State, urged that these reservations should be dropped, especially those regarding national service, in the interests of the creation of a truly free and independent international civil service. These representations received some credit.[10]

The General Assembly also took action upon the recommendation that the privileges and immunities of the specialised agencies should be ' unified ' with those of the United Nations, and by a resolution dated February 13, 1946, in which the fact that ' not all specialised agencies require all the privileges which may be needed by others ' was again recognised and the principle that ' no privileges and immunities which are not really necessary should be asked for ' laid down, instructed the Secretary-General to open negotiations with a view to the reconsideration, in the light both of the General Convention adopted by the United Nations and of the considerations recited, of the provisions under which the specialised agencies at present enjoy privileges and immunities. By another resolution of the same date the General Assembly invited the International Court of Justice at its first session to consider the question of the privileges and immunities necessary for its functioning, decided that it would itself deal with this question as soon as possible after the receipt of the suggestions of the Court, and recommended that pending a final decision the rules which had been applied to the Permanent Court of International Justice should be observed by Members of the United Nations in relation to the new Court.[11]

Having taken the stand it did before the General Assembly, His Majesty's Government proceeded with very little delay to introduce legislation in order to implement the Convention. A Bill was introduced by the Lord Chancellor and was passed by the House of Lords without amendment. But when the measure was laid before the Commons it provoked a protracted

[9] *Ibid.*
[10] *Ibid.*, 369; *Proceedings of the General Assembly, First Part of First Session* (H.M.S.O., 1946), Annex 16, p. 66.
[11] Misc. No. 6 (1946), Cmd. 6753, p. 8 (Annex to text of Convention).

debate, the record of which occupies more than 220 columns of the Official Report. It is not always easy to keep track of the argument whilst reading this not inconsiderable mass of material. But it would appear that the Opposition would not have contested the issue in the determined manner that it did had the Minister of State, Mr. Noel Baker, contented himself with asking for the mere enactment of the actual text of the Convention in statutory form. But the presence on the Statute Book of the Diplomatic Privileges (Extension) Act, 1944,[12] which already provided in some measure for the conferment of privileges upon international organisations, virtually compelled the Government to proceed by way of seeking amendment of that enactment. The result of this necessary course was to reopen the controversy, discussed before in these pages, which attended the passing of the earlier Act.[13] In the later debate the roles of some of the leading figures of the major parties had been reversed by a revengeful time, so that a good deal of partisan ammunition was lying about, of which speakers did not hesitate to make use. But even when this element in the matter is disregarded, there may be seen to remain serious justification for the objections advanced.

Already in his introductory explanation of the Bill, Mr. Noel Baker admitted that it went beyond the Convention to some extent; incidentally he made this admission by describing the Government's request as being for ' a blank cheque, but . . . an extraordinarily small one ', which nice contradiction in terms did not escape the attention of his opponents.[14] In employing it the Minister of State was referring, however, not to the fact that the Bill purported to confer upon the United Nations greater privileges than the Convention stipulated should be given, but to the circumstance that the Government was seeking by means of it to make provision also for the International Court of Justice and for the various specialised international agencies, whose final status, as has been seen, has yet to be determined. The Opposition did indeed put down two amendments designed to restrict the scope of the Bill to the United Nations alone, but withdrew them on undertakings being given that the Government would not use the powers it sought in relation to the Court or the specialised agencies until

12 7 & 8 Geo. 6, c. 44.
13 Egon Schwelb, *The Diplomatic Privileges (Extension) Act*, 1944, 8 Mod.L.Rev. (1945) 50.
14 *Hansard*, vol. 424, cols. 642–4; vol. 425, col. 801.

the appropriate organ of the United Nations should have arrived at a decision as to the privileges and immunities proper to those bodies.[15] The Opposition also put down an amendment designed to preserve the provision in the principal Act, which the Government wished to excise, whereby, in default of a resolution of both Houses continuing it in force, that Act expires after five years.[16] A division was forced upon this amendment, but it was defeated.[17]

The main fire of the Opposition was directed at that clause of the Bill which sought to excise the words ' other than British subjects ' from section 1 (2) (b) of the principal Act. That sub-section provided that His Majesty might by Order in Council confer upon such numbers of officers of an international organisation, being the holders of specified high offices and not being British subjects, certain immunities and privileges, being in general the like immunities and privileges as are accorded to an envoy of a foreign Power accredited to His Majesty and including in particular the like exemption or relief from taxes as is accorded to such an envoy. It was intended by the Bill so to amend it as to remove the distinction between British subjects and others to the benefit of the former in accordance with the recommendations of the various international committees which were incorporated in the Convention. And up to this point the Bill went no further than the Convention, which stipulated that:—

'. . . the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law '.[18]

The only difference between the text of the Convention and that proposed for the Act was that whilst the former spoke of the Secretary-General and the Assistant Secretaries-General the latter referred to a theoretically wider class of ' officers ', the holders of ' high offices ', both to be specified by Order in Council. Where, apart from a hypothetical lack of coincidence between these two categories of persons, the difference came in was that the Bill, as has been already explained, was not intended to apply only to the United Nations, and further, that as regards that body, as well as all other organisations in

[15] *Ibid.*, vol. 425, cols. 745–79, 779–811.
[16] *Ibid.*, vol. 425, col. 779.
[17] *Ibid.*, vol. 425, col. 796.
[18] Art. V, s. 19.

contemplation, it was proposed to confer full diplomatic immunity upon others besides holders of high offices, namely, persons employed on missions on behalf of organisations and representatives of member governments on the governing bodies or on any committees thereof. Still further, it was proposed to give to the staffs of such representatives of member governments, and to the spouses and ' children ' of such holders of ' high offices ' the privileges and immunities accruing to the staffs, spouses and children of envoys accredited to the Court of St. James. The only limitation upon all this bounty was that representatives of the United Kingdom Government and their staffs were not to participate in it.[19]

It soon emerged from the debate that these proposals not merely went beyond what the Convention required but also comprehended a category of persons theoretically capable of infinite extension and certainly incapable of precise computation.[20] In the first place, it was not at all clear how many foreign nationals might not benefit. At an early stage the eligibility under the proposed Act of officials of and delegates to such specialised agencies as ECITO and UNESCO, UNRRA and the European Coal Organisation was admitted. The objection to giving these persons the benefit of the Act was that the extent to which they required immunities is still under review. It was met, as has been explained, by the Government's giving an undertaking not to vary the Orders in Council already made in respect of them under the Act of 1944 until such time as some international agreement as to the privileges they require has been reached. Parenthetically, it may be mentioned that there then arose a question as to whether such an undertaking was possible, since the Bill proceeded by way of amendment of the principal Act. It was suggested that the effect of its enactment would be automatically to extend the Orders incorporating the original text by reference. The Government was unable to produce upon this point any more authoritative legal advice than that of the Treaty Department of the Foreign Office, a department surely not specially qualified to resolve so grave and so general a question as to the effects of amending legislation. Second thoughts on the matter led to a recommital of the Bill and

[19] These proposals went very considerably beyond the requirements of the Convention, which contemplates, for instance, the enjoyment by emissaries of and representatives to the United Nations of immunity of process in respect only of official acts and the rigid application in regard to such classes of persons of the principle of ' nationality discrimination ' (Arts. IV and VI).

[20] *Hansard*, vol. 425, col. 745 ff.

the rephrasing of the relevant saving clause so as to provide that nothing should ' extend or affect the validity or operation ' of Orders already made, an improvement of perhaps not absolute value.[21] The Government also gave way upon the question of the ' children ' of the various classes of persons eligible for privileges and immunities. The Minister of State at first thought that children meant children, but was later brought to see that it did not. He was helped in this process by the imagination of Mr. Boyd-Carpenter, who conjured up a vision of the Solicitor-General advising someone '. . . anent the preservation of his fortune from the depredations of the Chancellor of the Exchequer, " My dear fellow, your only hope is to marry the daughter of the medical director of UNRRA " '.[22] An amendment adding the words ' under the age of 21 ' to the word ' children ' was in consequence agreed to.[23] Upon this incident it is perhaps permissible to comment that, if in this context the word ' children ' without qualification could indeed be interpreted to include grandchildren and others less legitimately connected, the amendment hardly met the objection.[24] This point appears, however, to have escaped the Opposition.

What also seems to have escaped them is the importance of a question indeed touched on in the debate—that of the definition of an organisation. Opponents of the Bill, in a justifiable attempt to resolve this question, propounded the cases of the Cape Spartel Light authority, the Danube Commission, an imaginary River Plate Commission, a bi-partite international body set up to regulate the sale of sherry, and the Anglo-American Palestine Commission, and asked which of them was capable of specification under its provisions. With regard to this part of the debate it would appear that the Minister of State was perfectly right in pointing out that whether the proposed International Health Organisation comes into existence as a mere Commission of the United Nations, in which case it will come within the provisions of the new Act, or whether it will be an autonomous specialised agency, and thus for the moment outside it in view of the Government's undertakings to the Opposition, may well depend upon nothing more substantial than the amount of time available for the

[21] *Ibid.*, vol. 426, col. 367.
[22] *Ibid.*, vol. 424, col. 211.
[23] *Ibid.*, vol. 426, col. 376.
[24] For a recent case turning upon the meaning of the word ' child ' in a statute, see *Re Carlton*, [1945] Ch. 280 and 372.

drafting of its constitution.[25] But surely he need not have been as hesitant as he was about the pretensions of a possible River Plate Commission composed exclusively of representatives of riparian States.[26] For section 1 (1) of the principal Act is unaffected by any amendment and clearly limits the power of the Crown in Council to apply the provisions of the Act to cases of organisations of which the Government of the United Kingdom is a member. And, conversely, it would appear that he should not have been so confident that the test of an international organisation is its possession of corporate personality and, more particularly, its permanence.[27] For the principal Act has already been applied without question and, it is apprehended, without any misconstruction, both to UNRRA and to the Preparatory Commission of the United Nations, to the Provisional Organisation for European Inland Transport and the European Advisory Commission, and to the United Nations Information Organisation, the Intergovernmental Committee for Refugees and the United Nations War Crimes Commission, all of them temporary organisations, some of them already defunct, and some of them innocent of any pretensions to corporate personality save such as may be conferred by the very Act or the Orders made under it.[28]

Finally, upon this aspect of the Bill it may be said that the Minister was again perfectly right in arguing that the United Nations is to be a permanent body and that its future and the future of all international organisation will be assisted by the policy of bringing within its orbit a number of minor specialised international agencies. These are respectable grounds for seeking, if only for the sake of convenience, the 'unification'—'consolidation' is a better word and one adopted by Mr. Noel Baker himself—of the privileges and immunities of the organisations concerned both in the international sphere and in national legislation. But not even the faith and fire within Mr. Noel Baker can bring all international organisations into relationship with the United Nations. For

[25] *Hansard*, vol. 425, col. 750.
[26] *Ibid.*, vol. 425, cols. 751–2.
[27] *Ibid.*, vol. 425, col. 771.
[28] The full tale of Orders made under the Act is as follows: S. R. & O., 1945, Nos. 79 (UNRRA), 84 (UNIO, the Intergovernmental Committee for Refugees and the European Advisory Commission), 1211 and 1639 (the (Provisional) Organisation for European Inland Transport and the United Nations War Crimes Commission), 1539 (The United Nations Organisation (*sic*) and the Preparatory Commission), 1638 (Preparatory Commission of UNESCO) and 1946, No. 895 (European Coal Organisation). They are virtually identical in form and differ only in regard to the numbers of persons specified as entitled to privileges under them. In particular the Orders do not derogate from the

that is not the intention of the Charter. Articles 57 and 63 thereof clearly do not apply, for instance, to the Universal Postal Union, which may therefore be expected to remain autonomous.[29] This circumstance provides an additional argument for the view that the Bill went too far, one which was not, however, adduced against it in the House of Commons.

In the second place, the opponents of the Bill attacked it as going beyond the requirements of the Convention with respect to the position under it of British subjects. It was asserted that the conferment upon them of full diplomatic immunity would involve exemption from tax not merely of their official salaries but also of their private incomes wherever arising, and of the private incomes of their wives and of such of their relatives who came within the description of 'children'. In reply the Government asserted that private income arising within the United Kingdom would, in the case of persons resident here, still be taxable, but admitted under pressure that this was not the case with income from Government stocks.[30] This last is undoubtedly true, and what remains of the Government's thesis, namely, that United Kingdom income tax deducted at source is not recoverable by persons with diplomatic immunity, is not particularly convincing.[31] Apart from this, exemption from taxation even of official salary alone is in these days, as the Opposition quite properly pointed out, a privilege of great price. How valuable it may be was forcibly illustrated by reference to a Member of the House itself, Sir John Boyd Orr, who would normally require to earn some £200,000 annually in order to receive the net equivalent of a tax-free salary of £6,000 payable to him as Director-General of the Food and Agriculture Organisation.[32] Mr. Manningham-Buller saw in the situation the possibility open to

maximum of benefits capable of conferment under the Act except that the 'legal capacities of a body corporate' are not conferred on the European Advisory Commission, the United Nations Organisation and the Preparatory Commission, presumably for the reason that the grant of such would be unnecessary or inappropriate. See further *Annual Survey of International Law*, 1945 (International Law Section), Note by 'E.' in 22 B.Y.I.L. (1945) 249, and *Survey of the Constitutions of International Organisations* in 23 B.Y.I.L. (1946). Upon the international legal personality of international organisations and the effect of the attribution by municipal law to such bodies of corporate personality, see note by C. W. Jenks in 22 B.Y.I.L. (1945) 267, esp. pp. 273–5.

29 Cf. *Survey of the Constitutions of International Organisations* in 23 B.Y.I.L. (1946).

30 *Hansard*, vol. 424, col. 2124; vol. 425, col. 812.

31 The question would presumably turn upon the possibility of recovering such deductions by action.

32 *Hansard*, vol. 424, col. 2117.

the Government of providing numbers of ' jobs for the boys '.[33] This suggestion was not rejected out of hand by all on the Government side, Mr. Warbey in particular justifying privileges ' necessarily associated with the carrying out of service to the community ' and distinguishing them from those arising from wealth or power.[34] Some attempt was made to liken the privileges capable of conferment under the Bill to those of Members of Parliament. Upon the point it would appear fair to say that though the privileges discussed may not derive from wealth they indeed create it, since a high international official will have a net income higher than that of a Minister of the Crown, and that the analogy of Parliamentary privileges is false, these having been, in the words of Lord Winterton's apt emendation, ' gradually narrowed down from precedent to precedent '.[35] But the area of criticism of the Bill was small, the Opposition being agreed that the official salaries of international officials should be free of tax. They abstained, moreover, from dividing the House upon an amendment limiting the exemption from taxation to such official emoluments, so that the law is as the Government wanted it to be.

Several other matters raised in the course of the long and interesting debate upon the Bill are also worthy of comment. The discussion was pervaded throughout by a singular lack of information concerning the precise effect of the measures proposed. The Minister of State was compelled to retract his statement that the sole British beneficiary would be the single British Assistant Secretary-General of the United Nations when it was pointed out to him that the Bill covered other organisations besides that, as well as all organs thereof. Similarly, his refutation of the suggestion that these new offices of political privilege lay in the gift of the Government became less convincing when it was appreciated that the Bill covered not merely high offices at the disposal of the Secretary-General of the United Nations, who indeed may neither ask for nor receive instructions from any national administration, but also posts, including membership of missions, in an unspecified assortment of organs of an unspecified number of organisations. Further, his contention that the principle enshrined in the Convention—that the privileges and immunities of officials of the United Nations are primarily privileges of that Organisation and may be waived by the

[33] *Ibid.*, vol. 424, col. 651.
[34] *Ibid.*, vol. 424, col. 2083.
[35] *Ibid.*, vol. 424, col. 2113.

Secretary-General—was surely adequately disposed of by the reply that freedom from taxation is an exemption in the nature of things incapable of waiver in the same manner as immunity from process. At no point did the Minister adequately answer the argument that, whereas diplomatic privileges proper are grounded in reciprocity, those of international organisations are not, and there is no possibility of declaring an international official to be *persona non grata*. Finally, though much of the outcry against the creation of a class of British subjects freed from the duty on petrol, from the systems of clothes and food rationing, and from the various other restrictions, controls and exactions to which the nation in general is subject was possibly unworthy of refutation, Mr. Noel Baker did little to clarify the real facts. He took no notice, perhaps properly, of the allegations that diplomats in London receive a drawback in respect of the petrol duty, and that when in 1941 the United States decided that foreign diplomats should pay tax on private income locally derived two members of the British Embassy staff resigned their posts. But it was no answer at all to say, for instance, of foreign diplomats ' . . . . if, because they have the weary duty of a good deal of diplomatic entertaining, they are by courtesy given extra rations, that is nothing whatever to do with this Bill, or with the law '.[36] It is apprehended that, although the precise extent of diplomatic privilege proper may indeed depend to a great extent upon the administrative practice of the Foreign Office, when it comes to assimilating British subjects to the position of foreign envoys the resulting advantage should be exactly ascertainable and should depend on law.

Turning now to the Act [37] which arose out of the Bill, its main provisions are as follows: It extends the categories of persons upon whom full diplomatic immunity may be conferred under section 1 (2) (b) of the principal Act by excising the limitation to ' other than British subjects ' originally contained therein, and by adding to the ' holders of high offices ' in international organisations and to the representatives of member governments upon the governing bodies or committees of such organisations originally covered, another eligible class, namely, ' persons employed on missions on behalf of ' such organisations. In the same fashion it adds to the categories of persons upon whom certain privileges and immunities not amounting to full diplomatic privilege could

[36] *Ibid.*, vol. 424, col. 2124.
[37] 9 & 10 Geo. 6, c. 66.

under the principal Act be conferred; the privileges here in question are those set out in Part III of the Schedule to the principal Act, that is to say, immunity from process in respect of official acts and exemption from income tax in respect of official emoluments; and the extension of them to certain categories of British subjects is effected by the excission of the original proviso to section 1 (2), whereby it was enacted that no Order in Council made under the Act should confer any exemption from taxes or rates upon any person who is a British subject and whose usual place of abode is in the United Kingdom. In the third place, by an addition at the end of the same sub-section there is accorded the power of extending to the staffs of representatives of member governments on governing bodies or committees of international organisations and to the spouses and infant children of holders of high offices in such organisations, the privileges and immunities enjoyed respectively by the retinues and by the spouses and children of diplomatic envoys accredited to His Majesty. These three extensions of the original Act are subject to an overall proviso that no Order in Council made thereunder may confer any immunity or privilege upon any person as the representative of the United Kingdom Government or as a member of the staff of such a representative. In the fourth place, the Schedule is so amended as to add to the privileges capable of grant to organisations themselves (as distinct from individuals), those of exemption from tax on direct importations of their own publications, exemption from prohibitions or restrictions on import and export in respect of their own publications, and of goods for official use, and the right to send telegraphic matter intended for publication or broadcasting at Press rates. And the last amendment of more than consequential importance—apart from those transforming the principal Act into a permanent one [38] and providing that Orders already made are unaffected in validity or effect,[39] to which reference has already been made—is that whereby, insofar as the Act applies to the United Nations, it is provided that any reference in it to the governing body or committees of an organisation shall be construed as referring to the General Assembly, or ' any Council or other organ of the United Nations ', and that, in relation to the International Court, use may be made of the Act to confer upon Judges and Registrars, parties, agents,

[38] Cf. *supra*, p. 102.
[39] Cf. *supra*, p. 105 n. 28.

counsel and advocates such privileges as any resolution of, or convention approved by, the General Assembly may require.

Clearly the Act goes beyond the Convention to some extent. How far privilege and immunities may or will be granted under it in excess of the general international standard contained in the Convention is, however, most difficult to ascertain because of the circumstance that the Act is a mere enabling measure, to be implemented by particular Orders. But there is not to be gathered from it any evidence of that desire which manifested itself so clearly in the various discussions which led up to the adoption of the Convention and which is reflected to some extent in the text of that document and of the accompanying resolutions, the desire that no greater degree of immunity than was absolutely necessary should be enjoyed by either international organisations or their staff. That wholesome impulse is behind the declaration contained in the Convention to the effect that ' privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves '.[40] The same theme emerges even more clearly from the resolution concerning the privileges of the specialised agencies where ' the General Assembly considers . . . that no privileges and immunities which are not really necessary should be asked for '.[41] It is, it is apprehended, permissible, however, to suggest that the fathers of the world constitution, the sponsors of what may be termed the United Nations movement for the integration of international organisation in all its aspects, were more generous than they need have been in this matter of privileges and that the States, who may never be generous,[42] failed to consider the impact of their agreement *inter se* upon their domestic affairs. Can it really have been intended that the Director-General of the Food and Agriculture Organisation should be paid more than the King's First Minister and that he should further be saved harmless from the attentions of the Chancellor of the Exchequer in respect of the whole of any private income he may enjoy? It is at least difficult to reconcile this with the extreme delicacy shown in arranging the matter of the remuneration of the Director-General of UNRRA.[43] The

[40] Art. V, s. 20.
[41] *Supra*, p. 100.
[42] MacIver, *The Modern State*, 185.
[43] The Sub-committee of a Committee of the Council of UNRRA charged with this question reported as follows:
' . . . We have borne in mind the essential considerations that the salary should in the public mind reflect the dignity which we attach to the office of Director-General. We have been aware of some of the public discussions which in the past years have surrounded the questions of the salaries of the leading

conclusion is forced that sufficient attention has not been paid to the issues involved in perpetuating the system of diplomatic privilege in an age of international government.

It would, of course, be unwise to embark upon any criticism of the Convention without first consulting the writers whose opinions, in this legal realm, are a source of law. Attention is therefore called to the opinions of Mr. Jenks, who has made himself a master of the whole topic of international organisation and whose part in the drafting of some of the more recent international constitutions has been considerable,[44] and of Dr. Friedmann, whose wholly admirable study of the organisation of international economic enterprise has appeared in these pages.[45] Both these writers argue overwhelmingly against the association of international organisations with any particular State by their incorporation under its laws in the manner that the Bank of International Settlements was incorporated in Switzerland. Dr. Friedmann points out that the existence of such a state of affairs necessitates special provision to exempt the organisation from 'various national laws of the State, including taxation laws'.[46] He holds—and it is permissible to presume that Mr. Jenks would concur in his apt phrase—that such 'naturalisation' is 'a great physical and psychological obstacle to the development of international institutions'.[47] Certainly very convincing arguments upon this point are adduced, and it is not intended to counter them. Nor is it intended to imply that the learned authors referred to have missed any points concerning the working details of international organisation. Dr. Friedmann, for instance, insists that an institution fulfilling public international purposes but also engaging in civil and commercial transactions

officials of some international organisations; we think it is most important that the Relief Administration should not be involved in such controversies.

'We have not been ignorant of the fact that the United States Administration will presumably be the largest contributor to the International Fund and to the Fund for Administrative expenses.

'Thus we have had in mind that the salary should be so fixed as to reflect proper dignity, be taken out of the realm of any discussion and be tied to salaries already adopted by one of the principal members of the Council.

'For these reasons we recommend that the Director-General's salary be the salary of the members of the Cabinet of the President of the United States of America.' *Resolutions and Reports adopted by the Council at its First Session*, Misc. No. 6 (1943), Cmd. 6497.

44 Cf. *First Report of the Interim Commission on Food and Agriculture*, para. 5, Misc. No. 4 (1945), Cmd. 6590, p. 15.

45 *International Public Corporations*, 6 Mod.L.Rev. (1943) 185. See also C. W. Jenks, *Some Constitutional Problems of International Organisations*, 22 B.Y.I.L. (1945) 11, 58 ff.

46 *Op. cit.* 203.

47 *Ibid.*

—acquiring land, buying and selling goods and services, employing contractors and labourers—must be justiciable in respect of these private law activities. For the transfer of many economic functions in many lands from private to public hands must be reflected in the law. The age has passed when, as in the *Parlement Belge*,[48] a commercial vessel in the ownership of a State could be allowed immunity from jurisdiction. Indeed, there is little dispute about the direction in which the law of different States, to say nothing of international law, is moving in that matter. Again, though Dr. Friedmann holds that ' immunity from national jurisdiction . . . must be granted to the servants of public international institutions ', he regards their subjection to the jurisdiction of an international administrative tribunal, such as that created for the League and the I.L.O. in 1927, as ' a necessary counterpart of such immunity '.[49]

But the learned writers are not in advance of the law in these matters—as the existence of the League Administrative Tribunal adverted to sufficiently shows. And though, in the time of the League and to some extent since that time, there have appeared many valuable studies of the legal, physical and psychological conditions conducive to the smooth operation of organs of international government and to the engendering within them of a truly international spirit, it strikes the present writer that few have paused to consider the possible disadvantages involved in the possession by such bodies, and for the matter of that by ordinary diplomatic or quasi-diplomatic missions, of so-called diplomatic immunities or status.

The law and custom of diplomatic immunity being of some antiquity, it is not surprising that the privilege granted thereunder seems nowadays sometimes superfluous. For instance, the envoy's *droit de chapelle*—the right to practise his own religion—is no more of first importance. It has, indeed, come to comprehend the privilege of maintaining a church for the benefit of the local community of the Embassy's nationality. And possibly its exercise is a comfort to national communities abroad, especially those belonging to a State, such as Britain, maintaining a national church in connection with which celebrations of a patriotic as well as a religious significance are commonly held. Such communities are very often *plus royaliste que le roi*, especially if their ancestry be mixed, and

[48] L.R. 5 P.D. 197.
[49] *Op. cit.* 198.

the regular Embassy chapel service may be for them as patriotically appealing and as unifying an event as the occasional ambassadorial reception. The provision of the chapel—curiously, one of the few direct services to the local resident community provided by missions abroad—may, too, gratify persons marrying abroad by enabling them to observe the same ecclesiastical forms as they would at home. But clearly the *droit de chapelle* has come to be the privilege of foreign communities rather than foreign envoys. Equally clearly, in an age when there is toleration at least in matters of religion, it is now very often superfluous.

Yet of the numerous and now frequently anachronistic privileges of envoys which precedents seem to have done little to narrow, two more real than apparent still remain: exemption from taxation and immunity from process.[50] Exemption from taxation implies relief of three sorts: of the mission buildings from any land tax and rates, and of the members of the mission both from such indirect taxation as income tax, and from direct taxation, notably customs duty, also. The first of these exemptions is of no importance to the individual and is not of vital importance to the State. For presumably the rates and taxes payable, if they were payable or payable in full, on all of its embassies, legations and consulates abroad, would not utterly impoverish a State. Their imposition might indeed result here and there in the maintenance of establishments in some eyes unworthy of the dignity of sovereignty. But the real dignity of States must ever depend on their behaviour rather than on their architectural ambition, and the taxation of diplomatic buildings might well restrain a vulgar ostentation and rivalry not unknown in the diplomatic quarters of some capitals.

Exemption of the official salaries of diplomatic envoys may well be necessary for the mere facilitation of calculation of such salaries within the foreign service of any one State. Whether and to what extent a like immunity does or should extend to the private incomes of envoys is another question. But in either case the operation as an exclusively diplomatic privilege of this particular immunity becomes less and less necessary as treaties providing for relief from double taxation become more numerous. In any event, insofar as it relates to official emoluments, it is a factor which has long been taken into account in

[50] For a full treatment of the privileges and immunities of diplomatic envoys, see Oppenheim, *International Law*, 7th ed. by H. Lauterpacht, Vol. I, para. 384 ff.

their calculation, so that its advantage is, or at least may be made to be, to the sending State rather than to the individual emissary. Indeed, in the case of Great Britain, when during the recent war many persons were sent abroad to represent many departments, the envoy *de carrière*, the regular foreign-going official of the Foreign Service, very often came off considerably worse than some of his less regular colleagues because of the Foreign Office's old experience in anticipating diplomatic immunity and in allowing for it when computing salaries. Other departments, concerned normally with establishing scales of taxable salaries, did not always remember that those of their staff sent abroad would be beyond the ordinary jurisdiction of the Chancellor, so that in many cases they allowed them salaries considerably in excess of those receivable in comparable grades of the Foreign Service. The Treasury, too, was often behindhand in devising means to correct such errors, and no common regulations, such as those of the Rucker Scheme, relating to maxima of net emoluments were ever universally adopted. To some extent the confusion was added to by the varying policies of receiving States in regard to the extent to which they were prepared to treat the non-diplomatic staffs of missions as having diplomatic status.

Thirdly, diplomatic immunity from taxation involves exemption from customs duties. The textbooks in describing this immunity are careful to state that it does not extend so as to exempt from duty what may be called commercial quantities of goods. This is no doubt the case in general, but the definition of a commercial quantity is a difficult matter. In consequence there do occur, it is not to be denied, instances of individual profit-taking. If, for example, an envoy proceeding to a post take with him a year's supply of any particular commodity—especially food—and is transferred to another post almost at once he may obviously realise a handsome sum from the disposal of his personal stocks. In normal times the advantage of the immunity will not indeed be great, for, on the one hand, the envoy will have paid in all probability in the country from which he has come a duty very similar to that which he escapes, so that the combination with diplomatic journeyings of even a small luxury trade can hardly be profitable. And, on the other hand, it is customary in most countries to permit a private person who has been resident for two years or so to take out his household goods free of duty so that, if there be a luxury trade of this description, it is one in which many travellers may compete. But the case is altered when

war so dislocates the supply and price systems of certain countries that the most common articles, such as soap, acquire a fantastic scarcity value and when general conditions make the importation of very large stocks not unreasonable provision for exclusively personal needs. It is not to be supposed that a French government would, for instance, in normal times look with favour upon the importation by a third secretary of 20,000 cigarettes and a comparable quantity of other luxury goods. But the case is very much altered in this year of 1947, and it is hard to see that France—or even Britain—could reject a representation that so large an importation was merely a sensible insurance of personal comfort. Yet, when cigarettes and other improbable objects are currency, the potentiality for profit of the diplomatic immunity from duty is not to be ignored. It will be seen, indeed, to be the greater when it is recalled that the facilities of NAAFI and its corresponding organisations in other States have been made available to Embassies abroad. How NAAFI should have come to serve the Foreign Service and associated missions abroad, and upon what conditions its importations into foreign countries have been permitted, is totally unknown to the present writer. It is not desired in any way to suggest that there is involved anything more than another of those anomalies of travel such as the individually agreeable experience of cheap liquor aboard ships in peacetime when once the three-mile limit is crossed, or the rather less agreeable than conscience-striking discovery of abundant sweetmeats and razor blades —again cheap, but, more astonishingly, existent—aboard outward bound ships in time of war. But obviously, if times of general scarcity have produced the anomaly of diplomatic shops, possibilities of abuse arise.

It is not intended in the least to imply that the liberty which diplomatic envoys and their staffs possess to import to the places where they are stationed limited quantities of goods free of duty is one which is often abused or ever abused with impunity. In the goods-hungry world of to-day, when virtually all travel is on government account, it is, however, a privilege likely to be jealously regarded. But the jealousies it may engender are not nearly so serious as those caused by the disparity in salary of comparable grades of official service abroad. Further, the remedy, if any be needed, would seem to lie in the hands of the sending rather than the receiving State. It is for the former to consider whether it should permit, by administrative inattention or otherwise, an inequality of

condition amongst persons serving it abroad. The attachment to diplomatic missions of numerous technical staff emanating from many different departments certainly creates the possibility of inequality of this sort. It may, incidentally, arise not merely in relation to salary and free importation but also as regards participation in such other diplomatic facilities as use of the bag or pouch for private correspondence—a privilege of very great value in times of disrupted communications. But the receiving State cannot properly judge of these matters, which are largely of exclusively domestic concern. And the sending State, in judging of them, may or should presumably take into account also the propriety of unequal treatment of those who serve it abroad and those who do so at home. Again, in this regard, individual opinion may be influenced by temporary hardships. That third secretaries should in time of war be permitted cars when there is no private motoring in the home State may well seem unfair. But it may equally well be that some compensation should be permitted to men sent to distant stations from which they may not for long periods be able to obtain home leave. It may be said in general that a State is unwise in permitting too great a disparity in the conditions of life of its representatives abroad and of its citizens at home. It is scarcely to be suggested that His Majesty's Ambassador in the Argentine—that land of wheat and beef—should be subjected to a system of bread and meat rationing. And there is at least something in the traditional argument that a diplomatic mission must use a little display to maintain the dignity of the sending State. But a State should no more 'live beyond its station' abroad than it should permit its representatives so to insulate themselves from privation as to lose all sense of the way of life of the home community of which they are essentially members.

The second traditional privilege of diplomatic envoys of enduring value is that of immunity from suit. In regard to it there is infinitely more information available than there is touching exemption from taxation. This is, of course, because the former is a privilege often tested in the Courts of the receiving State. As a result of that its limits are fairly clear. They are adequately explained in two recent cases before the British Courts, *R.* v. *Kent* [51] and *Dickenson* v. *del Solar.*[52] In the decisions in those cases it was pointed out that immunity

[51] 57 T.L.R. 307.
[52] [1930] 1 K.B. 376.

from suit is granted to envoys and their staffs in order that they may not be prevented from exercising their functions freely. The privilege is granted primarily to the sending State, which may waive it in respect of the head of mission, who in turn may waive it in respect of his subordinates. Such waiver is not uncommon. A State will, in the event of gross abuse of the privilege by its envoy, waive it in the same manner as it will accede to a request for his withdrawal. For to do otherwise would be to risk the whole course of friendly relations between the two countries concerned. And though in the textbooks the privilege is expressed to extend beyond the period of the envoy's mission in order to enable him to reach his own country unmolested, it would appear that there is a positive duty upon the accrediting State to refuse to countenance its abuse by any individual. This seems a fair deduction from the actual decision in *R.* v. *Kent*, where a clerk dismissed for misconduct from the United States Embassy in London, in respect of whom diplomatic immunity had been waived by the Ambassador, was unsuccessful in a plea to the jurisdiction on the basis that the privilege he had once enjoyed would save him harmless until he returned to his own country. To admit such an argument, said Lord Caldecote, C.J., would be to allow the privilege to be a ' cloak for fraud '.[53] The layman surveying the numerous cases concerning it might be tempted to think that that is exactly what the privilege is. For to read the average facts is to gain the impression in each case that a disreputable evasion of legal liability either did or did not succeed.

Possibly this impression arises in some sense from the very nature of law books and law reports, for litigation is so frequently the result of a breakdown or breach of the rules of social and moral conduct. Thus a survey of the cause list of the High Court to-day, taken up as it is as to four parts by petitions for divorce, might give the observer quite wrongly to think that family life in England is nearly always disastrous and sordid. But of course the more frequent successful marriage does not in the nature of things pass under the review of the Courts. May, however, the analogy be adopted? Is the normal case that of the honest diplomat fully intending to satisfy his obligations and distracted by vengeful creditors from discharging the functions of State? The answer is, partly, as pointed out by MacKinnon, L.J., in another recent

[53] 57 T.L.R. 307, 308.

case, that formerly, in England at least, a civil action began with arrest on a *capias*.[54] This is no longer the case, and it is difficult to see that modern civil process, or even criminal proceedings in respect of minor offences such as those associated with motor cars, can much distract the diplomat of today. Be that as it may, the mass of decided cases concerning immunity of suit, however discouraging to the moralist the details of them may be, contain a series of general rules which are evidently applicable equally to other privileges of the envoy. From them is to be collected that such privileges are concessions to the sending State and that their safeguards are the circumstance of their reciprocal enjoyment and the capacity of the receiving State to declare any particular envoy *persona non grata*. So far as the individual envoy is concerned, his privileges are but courtesies shown him that he may the more smoothly and easily transact the business of the State which sends him. Because his master was anciently more often than not an absolute prince, some of the pomp and ceremony associated with the progresses of such potentates was accorded also to the envoy. In a greater or less measure this reflection of the magnificence of personal sovereignty has survived into modern times. But that the prerogatives of ambassadors are not personal attributes is still clear, as in cases of abuse the Courts will not be slow to show.

When we pass from the age when international relations were exclusively between States and mostly between monarchies to one in which there exists a system of international organisation so far-reaching that it may without impropriety be referred to as a rudimentary world government, the problem of the facilitation of official intercourse is a different one. There is the same need for courtesy and for the careful cultivation of habitual, easy relations. There is much to be said for a certain formality. Thus, for instance, it is well that the world's constitutional instruments should be clothed in language as noble as the time can offer. And it is therefore to be regretted that the Charter of the United Nations does not in this regard equal the Covenant. But though the pomps and pageants of today are but the simplicities of yesterday, the clothing of new institutions in antique forms, be they of words or of conduct, is an absurdity. There has been one instance of this in international practice in the past—the according of Royal Honours to Republics; happily it has

[54] *The Amazone*, [1940] P. 40, 46.

found the oblivion it deserves. To perpetuate the system of diplomatic privilege in relation to the organs of international government would be to run the risk of creating another. It would, moreover, be one involving more than mere antiquarianism. It would constitute a wholly false mutation of an institution already under suspicion of having outlived its usefulness. For as between international organisations and States, the safeguards which make the institution of diplomatic privilege still tolerable as between States do not exist. There is no condition of exact reciprocity in the former relation and there is no capacity in a State called upon to admit an official of an international organisation to its territory to declare him *persona non grata* any more than there is in the international organisation to reject the delegate of any State's choice.[55] There is thus, despite such a formula as that of Art V, s. 20 of the Convention already quoted, no direct guarantee that the privileges of international officials will not come to be looked upon as personal privileges.[55] In this connection it may be fairly said that, despite the safeguards alluded to,

[55] It is to be remarked that the Diplomatic Privileges (Extension) Act, 1944, does indeed contain the following provisions: (1) s. 1 (3), whereby the Secretary of State is directed to maintain lists of persons entitled to full diplomatic immunity under the Act and is empowered to do likewise in relation to persons deriving some less degree of privilege therefrom, such lists where they exist being, in virtue of subs. (4), conclusive of the fact that any person is or was included or not included at any time among the persons entitled to privileges and immunities under the Act; and (2) s. 4, whereby there is expressly reserved to the Crown the right to withhold or withdraw from nationals or representatives of any Power any privileges or immunities on grounds of lack of reciprocity. But it is impossible to extract 'what is in effect a right of *agréation*' from these provisions as Professor Preuss is able to do from the United States International Organisations Immunities Act, 1945 (*Public Law* 291, 79*th Congress* (*ch.* 652, 1*st Sess.*)). The latter enactment contains, in addition to a section identical with s. 4 of the United Kingdom Act and a stipulation that no person shall be entitled to the benefit thereof unless he shall have been notified to and accepted by the Secretary of State, a provision giving the Secretary of State power to require the departure of any person otherwise entitled whose 'continued presence' in the United States is 'not desirable'. The result would thus indeed seem to be that the United States Secretary of State has power to declare an international official to be *persona non grata*. The question of the compatibility of the American Act with the General Convention thus arises. But in this connection it is to be noted that the former antedates the latter and was designed in some measure as an advertisement of the attitude the United States proposed to take in the international deliberations upon the matter. Cf. Preuss, *The International Organisations Immunities Act*, 40 A.J.I.L. (1946) 332. Perhaps a similar motive inspired the inclusion in the United Kingdom Act of 1944 of a single section dealing with the privileges on international organisations. (Cf. Schwelb, *ubi cit. supra.*) But if that be so the enactment of the later measure demonstrates that the attitude of the United Kingdom administration in the matter has undergone a profound change. In spite of the later Act, however, the provisions of the principal Act summarised above still remain. But it would appear impossible that they could be employed in order to discriminate against an individual official. There is thus no power in the (British) Secretary of State to declare such an individual *persona non grata*. This was pointed out in the course of the Commons debate on the 1946

diplomatic privileges proper are to some extent looked upon by some of those who enjoy them as personal to themselves. On no other basis can the attraction and the reputation, both highly individual, of the diplomatic career be explained. In addition, therefore, to the practical objections discussed, it may well be that there are psychological considerations to be taken into account in this matter. The present writer is incompetent to investigate the psychology of privilege. But it has two obvious aspects: the impression created in the mind of the official by reason of its enjoyment, and that which it arouses in the mind of the public. Perhaps these impressions are not the same where an international official is concerned as with a diplomat proper. For there has been until now less of glamour surrounding the former than is commonly associated with the latter; but this is a situation which may well change comparatively rapidly. Further, if there be less pomp in the international as compared with the national service, there is possibly also less discipline to discourage the lovers of pomp. The whole inquiry is an interesting one but it cannot be pursued here. All that can be said is that diplomatic missions are notoriously cut off both from the communities they represent and those in the midst of which they are sent to live and that governments are constantly seeking, by such expedients as the attachment of publicity officers to embassies and the exchange of unofficial missions, to counteract the resulting serious imperfection and unreality of their relations. It is not to be doubted that this situation arises at least in part from the fact that the diplomat both considers himself and is considered a superior being. To some he may seem an unhappy figure, playing a lifelong game of general post between a comparatively small number of places in which he encounters none but others of his kind. But to others he is a figure to be envied. Upon either view he is seen to be a man set apart. And this is to be attributed to a great extent to his privileges which in a very material fashion take him out of the category of the common man either at home or abroad. In the course of time he will cease entirely to be representative of his country. He may then, in moments of crisis, be unceremoniously replaced by a non-career man, an

Bill by Mr. John Foster (*Hansard*, vol. 424, col. 2089). An Opposition Front-Bencher, however, Mr. Harold Macmillan, appeared to be unimpressed by the absence of any such formal power, holding that the practical necessity that an international official shall be acceptable to the local authorities with whom he must deal to be a sufficient protection (*Hansard*, vol. 425, cols. 767–8).

amateur in the diplomatic game but a much more representative figure. No such possibility of rapid replacement of international officials of course exists. Theirs is not, and quite properly not, a *quamdiu* tenure. It is submitted, therefore, that the problem of guarding against their self-isolation is by so much the greater and that it is indeed quite as important as that other problem which exists in regard to them and to which much attention has been paid—that of securing their independence of improper governmental influence. A subservient international civil service would be pernicious: one functioning in a vacuum insulated by privileges and immunities scarcely less so.

Clive Parry.

FOREIGN PRESUMPTIONS AND DECLARATIONS OF DEATH AND ENGLISH PRIVATE INTERNATIONAL LAW

I

The loss of human life which inevitably accompanies war gives rise to special problems in the administration of the law. Some of these problems result from the fact that combatants are posted 'missing presumed killed', without the facts of their death being ever established with certainty. The last war showed that 'missing presumed killed' persons need not be confined to soldiers. The deportation and extermination policies of the Nazis greatly multiplied civilian cases of that kind. Six million Jews, and millions of others, of all nationalities, perished, and often the Nazis deliberately destroyed all record of their victims' deaths.

A number of the victims had property in this country. The question will frequently arise whether or not English law will presume their deaths; more particularly, the extent to which English private international law leads to the application of foreign presumptions and declarations of death must be examined.

Problems of this kind may be incidental in many cases. This essay has to confine itself to discussing those circumstances where they are most likely to be met, *viz.*, the following:—

(1) The death of a person may have to be established as the essential preliminary to a grant of probate or of letters of administration.

(2) The claim of an applicant to such a grant may be dependent on the death of others who would have a better right if alive but who are missing at the time of the application.

(3) The distribution of an estate will depend on the death or survival of beneficiaries.

(4) Similar questions may arise with reference to settlements and contracts *inter vivos*.

(5) The validity of an English marriage may depend on the dissolution of any previous marriage through death or legally equivalent facts.

II

It will appear that the choice of law exercised by English private international law is in favour of the application of English municipal law in quite a few of those cases where a foreign element is involved. A survey of the relevant provisions of English municipal law is therefore indicated.

(1) The Probate Division does not *pronounce* on the death of the person to the estate of whom its grant refers. If it is satisfied that the evidence points to a reasonable presumption of death, it gives *leave* to the applicant *to swear* that the death of a missing person has taken place.[1] Its decision does not follow automatically the common law rule [2] that a person who has not been seen or heard of for more than seven years may be presumed dead, though due weight is given to that presumption.

Again, the Court does not pronounce on the *date* of death, but gives leave to the applicant to swear

> that according to his belief the death occurred on or after a certain date, or that the deceased died on one of two possible dates, or on some date between the two.[3]

If the *place* of death be unknown, the oath may be varied to the effect that the deceased died at some place unknown.[4]

Leave to swear has repeatedly been given after disappearance for much less than seven years; so in shipwreck cases,[5] but also if justified by other circumstances.[6]

The application for leave to swear should state all facts reasonably necessary to satisfy the Court.[7]

Where the gross estate does not exceed £1,000, the order may be made by a Registrar.[8]

If it should subsequently appear that the ' deceased ' is in fact alive, then the grant has to be revoked.[9] Moreover, the

[1] *In the Goods of Jackson* (1902), 87 L.T. 747; Tristram and Coote, *Probate Practice* (19th ed., 1946), p. 412 (*h*).
[2] See, *e.g.*, *In the Goods of Robertson*, [1896] P. 8.
[3] *In the Goods of Dodd* (1897), 77 L.T. 137; *In the Goods of Hurlston*, [1898] P. 27; for the procedure if *only* the date and not the fact of death is uncertain, see *In the Estate of Long-Sutton*, [1912] P. 97, and *Annual Practice* (1945), p. 1099.
[4] Tristram and Coote, p. 91.
[5] *In the Goods of Main* (1858), 1 Sw. & Tr. 11; *In the Goods of Saul*, [1896] P. 151; *In the Goods of Dodd*, cited note 3.
[6] *In the Goods of Matthews*, [1898] P. 17; *In the Goods of Winstone*, [1898] P. 143; *In the Estate of Walker*, [1909] P. 115.
[7] As to particulars, see Tristram and Coote, pp. 312, 413 ff.; *In the Goods of Clarke*, [1896] P. 287.
[8] See *Practice Note* of November 6, 1940, and see as to other exceptional cases left to the Registrar, Tristram and Coote, pp. 312, 414.
[9] *In the Goods of Napier* (1809), 1 Phill. 83.

grant will not be conclusive evidence of the deceased's death in another Court.[10]

(2) It has been enacted that the Probate Court 'under special circumstances' may grant letters of administration to others than those who have a legal claim.[11] Under its powers, the Court, exceptionally, may even refuse probate to the person appointed executor.[12] Thus it is possible for the Court to pass over persons who have disappeared and may be presumed to be dead, and even to dispense with their citation by advertisement.[13] The Court may give leave to the claimant in such a case to swear to his right, *e.g.*, that 'he believes himself to be the next of kin'.[14]

A person's claim to a grant may depend upon the *date* of death of the deceased; where the Court had given leave to swear that the death occurred on or since a certain date, the commencing date fixed by the order of the Court is acted upon in the registry in deciding as to the person entitled.[15] The claim may also depend on the *date* of death of a person with a better claim presumed deceased, and here, too, the Court will use its discretion.[16]

(3) It is outside the scope of the Probate Division that we find the real field of the well-known common law presumption [17] that

> if it is proved that for a period of not less than seven years no news of a person has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead.[18]

The presumption is not limited to common law; it was frequently applied in the Equity Court (even before 1875) when

[10] To be implied from *Allen* v. *Dundas* (1789), 3 Term Rep. 125–130, and *Zachariah* v. *Page* (1818), 1 B. & A. 386.

[11] S. 162, Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9, Administration of Justice Act, 1928 (similar already s. 73, Court of Probate Act, 1857).

[12] *In the Estate of Potticary*, [1927] P. 202.

[13] *In the Goods of Reed* (1874), 29 L.T. 932; *In the Goods of Callicott*, [1899] P. 189; *In the Goods of Love* (1901), 17 T.L.R. 721; *In the Goods of Chapman*, [1903] P. 192.

[14] See *In the Goods of Reed*, cited note 13.

[15] See Tristram and Coote, pp. 311, 312.

[16] See *In the Goods of Peck* (1860), 2 Sw. & Tr. 506; the Court does not give leave to presume the death of a person other than that whose estate is to be administered: *In the Goods of Clark* (1889), 5 P.D. 10.

[17] As to the historical sources of that presumption at common law, see *Doe* v. *Nepean* (1833), 5 B. & Ad. 86, at p. 94.

[18] As formulated in Halsbury's *Laws of England*, 13, 630.

the death of a beneficiary under will or on intestacy was in dispute.[19]

It must be noted that there is no presumption with regard to the date of death; accordingly, the onus lies on the claimant to prove that the beneficiary survived the testator.[20] In the absence of proof of survival the interest will fall into residue or go to the next of kin, as the case may be.[21] Conversely, he whose claim as beneficiary is based upon the death of another person has to bring sufficient evidence to enable the Court to presume the death.[22]

The Court has the power to establish on the facts that the death of a missing person occurred even before the expiration of the seven years since his disappearance. It is not an easy task, however, to convince the Court—in cases where the presumption does not apply—that a missing person is in fact dead.[23]

The case of ' commorientes ', frequent in warfare and seafaring, has given rise to many doubts. It has now been enacted in section 184, Law of Property Act, 1925, that

> in all cases where . . . two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

This applies where several persons perish in *one* incident, unless there is evidence that one survived the other(s).[24]

(4) The rules set out above are applicable in cases where a

[19] *Norris* v. *Norris* (1678), Finch R. 419; *Bailey* v. *Hammond* (1802), 7 Ves. 590; *Dowley* v. *Winfield* (1844), 14 Sim. 277; *Cuthbert* v. *Purrier* (1847), 2 Phil.C.C. 199; *Hickman* v. *Upsall* (1875), L.R. 20 Eq. 136; *Re Benjamin*, [1902] 1 Ch. 723; *Lal Chand Marwari* v. *Mahant Ramrup Gir* (1925), 42 T.L.R. 159. Sometimes the Court confined itself to provisional measures so as to secure the fund in question: *Danby* v. *Danby* (1859), 5 Jur. (N.S.) 54; *Re Rhodes* (1873), 28 L.T. 392; more frequently it required the party to whom a fund was adjudicated as a consequence of an application of the presumption of death to give recognisance for refund if necessary: *Finch* v. *Finch*; *Bailey* v. *Hammond*; *Dowley* v. *Winfield*; *Cuthbert* v. *Purrier*, all cited above. For present Chancery practice, compare *Annual Practice*, 1945, pp. 1137–1138.

[20] *Re Phené's Trusts* (1870), 5 Ch.App. 139; *Re Lewes' Trusts* (1871), 6 Ch.App. 356; *Re Walker* (1871), 7 Ch.App. 120; *Re Rhodes* (1887), 36 Ch.D. 586; *Re Aldersey*, [1905] 2 Ch. 181. The death may be held to have occurred prior to the expiration of the seven years, see, *e.g.*, *Hickman* v. *Upsall*, cited note 19.

[21] *Re Phené's Trusts*; *Re Lewes' Trusts*; *Re Walker*; *Re Aldersey*; *Re Benjamin*, [1902] 1 Ch. 723.

[22] *Re Green's Settlement* (1865), 1 Eq. 288.

[23] As can be seen from *Re Butler's Settlement Trusts*, [1942] Ch. 403.

[24] *Hickman* v. *Peacey*, [1945] A.C. 304; for other authorities on s. 184 and for possible cases, see Tristram and Coote, pp. 313 ff.

claim is made under a settlement or contract *inter vivos* and the title is dependent on the death of another person whose death may be presumed.[25]

Trustees have to take into regard legal presumptions of death to the same extent as the Court.[26]

(5) To avoid bigamous and therefore void (and criminal) contracts of marriage, a statutory provision [27] requires that a notice of marriage has to be accompanied by a declaration that the person giving notice

> ' believes that there is no impediment of . . . alliance . . . to the marriage '.

In addition, both parties have to state at the marriage ceremony that they do not know of any legal impediment.[28]

This they cannot conscientiously do, if they only believe without knowing for certain that the partner of a previous marriage of one of them is dead. To overcome this difficulty it has been found necessary to enable the partner of the missing spouse to obtain a dissolution of the marriage in suitable cases. Section 8 of the Matrimonial Causes Act, 1937, enables [29] any married person who alleges [30] that reasonable grounds exist for supposing that the other party to the marriage is dead, to present a petition to the Court to have it presumed that the other party is dead and to have the marriage dissolved. It is evidence of death, until the contrary is proved, that the other party to the marriage has been continually absent from the petitioner for a period of seven years or upwards, and that the petitioner has no reason to believe that he or she has been living within that time.[31]

The marriage is dissolved [32] after decree absolute [33] against which no successful appeal is made, and it is immaterial that the missing spouse has in fact survived and subsequently reappears.

[25] *Re Beasney's Trusts* (1869), L.R. 7 Eq. 498; where a person was named in a deed as alive it was held that the onus of proof rested on a party who asserted that he was dead at the time of the deed: *Re Corbishley's Trusts* (1880), 14 Ch.D. 846, and see Life Policy Claims and Presumed Deceaseds' Grants, in 95 Law Journal (1945), p. 85.

[26] See *Dobson* v. *Pattinson* (1857), 3 Jur. (N.S.) 1202.

[27] See Marriage and Registration (Amendment) Act, 1856 (19 & 20 Vict. c. 119), s. 2.

[28] See Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20.

[29] As—already in 1912—recommended by the Royal Commission on Divorce.

[30] As to the affidavit to be given, see Latey, *Divorce* (13th ed.), p. 492.

[31] As to the evidence to that point, see *Parkinson* v. *Parkinson*, [1939] P. 346.

[32] See the concluding paragraph of s. 8, Matrimonial Causes Act, 1937, and s. 184, Supreme Court of Judicature (Consolidation) Act, 1925.

[33] But not after a mere decree nisi: *Manser* v. *Manser*, [1940] P. 224.

It has been stated [34] that section 8 cannot be used for setting up the fact or date of death in probate, but normally, similar evidence will be effective in probate and in dissolution proceedings.[35]

III

(1) The English Probate Court has jurisdiction whenever a person dies leaving assets within its jurisdiction.[36] The death of the deceased is the basis of the proceedings, and this fact, like the whole administration of the deceased's estate,[37] is determined by English law.

If the applicant swears to the fact and date of death he may explain, if it seems necessary, the circumstances which enable him to make his statement. In case death occurs abroad, foreign death certificates or other documents may be produced in support and be proved in accordance with English law.[38] Though it is believed that the practice of the Principal Probate Registry is very fair and accommodating, many cases remain where no such statement on the fact and date of death can honestly be made. If this happens, the English rules set out above [39] are applicable, but they are supplemented by the presumptions of death adopted by the foreign law of the deceased's domicil. The headnote to *In the Goods of Spenceley* [40] states that

> where a foreign Court of competent jurisdiction had made a grant of administration on the presumption of the death of the intestate, the grant might be accepted by the Court of Probate as sufficient proof of the death without requiring it to be proved by independent evidence.

The opinion has been expressed by Tristram and Coote [41] that the foreign grant is accepted only ' as being corroborative, but not conclusive evidence of death ', but this opinion is contrary to the very words of the President. He said :—

[34] Tristram and Coote, p. 167.
[35] So rightly, Latey, p. 85.
[36] *Evans* v. *Burrell* (1859), 28 L.J.P. & M. 82; *In the Goods of Tucker* (1864), 3 Sw. & Tr. 585; Dicey, rule 76, and cases stated by Dicey. The English Court has jurisdiction too, if a person dies domiciled in this country even if there are no assets within the jurisdiction: Administration of Justice Act, 1932, s. 2 (1).
[37] Dicey, rule 191, pp. 791 ff.; Cheshire, p. 505; *Re Wilks*, [1935] Ch. 645.
[38] Cheshire, p. 644; Dicey, p. 851, and cases cited there—and compare also Evidence Act, 1851, and Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, at present applicable in relation to Belgium and France under Statutory Rules & Orders, 1933 (No. 583), and 1937 (No. 515).
[39] Set out *sub* II (1).
[40] [1892] P. 255.
[41] P. 312.

> ' I am inclined to accept and follow the grant as it stands without requiring *any evidence* of this man's death ' (page 256),

which indicates that it is in itself ' sufficient ' evidence even if not necessarily conclusive. In that case the grant had been made by a Wisconsin Court of Probate. It is immaterial whether the Court of the deceased's domicil was a Court of Probate or a Court specifically charged with the task of making ' declarations of death ' which establish a presumption of death,[42] so long as it was a Court of competent jurisdiction according to the law in question.

This makes it possible to deal with the assets of many victims of Nazism without delay, because some continental laws contain well defined rules for the presumption of the death of persons missing after being imperilled as, *e.g.*, by deportation to a Nazi extermination camp.[43]

In the same way a presumption of death, recognised by the *lex domicilii* and existing independently of a judicial declaration of death, appears to be sufficient, as in this case a rule, discussed below,[44] should be applied by way of analogy: according to this rule the English Court will apply the law of the deceased's domicil with regard to the person to whom it makes a grant, even if he has not been appointed by a foreign Court.

It is doubtful whether the Court could act on the strength of a foreign declaration or presumption of ' absence ',[45] even if under the foreign law this would be a sufficient basis for an administration of the ' absent's ' estate.[46] That law as such is not applicable in an English administration which requires actual or presumed death, and not mere absence.

(2) Where a person dies domiciled abroad, leaving movables[47] in England, the Court will make a grant[48] to

[42] As under the German statute of July 4, 1939; the Dutch Burgerlijk Wetboek, ss. 523, 524, and the Polish Statutory Order of August 29, 1945.

[43] S. 7 of the German statute cited note (42): one year; Art. 14 of the Polish Order cited note (42): one to three years.

[44] See III (2).

[45] So, *e.g.*, French and Belgian laws.

[46] See French and Belgian Civil Codes, artt. 120 ff.

[47] Victims of Nazi oppression rarely had *immovable* property in this country, therefore this essay confines itself, as a rule, to dealing with succession to movables.

Note that if the estate was completely administered abroad and the property brought to this country the Court will consider that sufficient evidence of death: *Jerrad* v. *Spicer* (1863), 11 W.R. 634.

[48] See Dicey, rule 130, and the numerous authorities he cites, of which *In the Goods of Earl* (1867), L.R. 1 P. & D. 450, can be considered the leading case.

whoever is the personal representative [49] under the law of the domicil ' no matter who he is or on what grounds he has been clothed with his power '.[50]

It has to be noted that

(a) a grant may be made to the person entitled under the law of the domicil, even if no principal grant was made in the country of domicil [51] ;

(b) in the case, frequent in continental law, where no personal representative has been appointed by the Court of the domicil, the grant may be made to the person who, under the *lex domicilii*, is entitled to deal with the estate, *e.g.*, as the ' heir ' or ' universal successor ' [52] ;

(c) the Court will not grant to the foreign representative as such more powers than he would have under the law of the domicil.[53]

The application of these rules does not imply any ' choice ' of foreign law, but rather the adaptation of the English law of administration of estates [54] to cases with a foreign element. Accordingly, if the foreign representative or ' heir ' himself is missing, as may frequently occur when victims of Nazi oppression are concerned, this is a ' special circumstance ' enabling the Court in accordance with section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, to appoint another suitable person.[55] The same course would be pursued if the representative is an enemy subject resident in enemy territory,[56] but there is no reason to abstain from appointing him if he is a refugee resident in this country.[57]

Where the personal representative, according to the *lex domicilii*, is also entitled to the grant by English law, the

[49] Or a person appointed by him: see *In the Goods of Abdul Hamid Bey* (1898), 67 L.J.P. & M. 59; *In the Goods of Meatyard*, [1903] P. 125; *Re Achillopoulos*, [1928] Ch. 423.

[50] *In the Goods of Earl*, cited note (48); *In the Goods of Smith* (1868), 16 W.R. 1130; *In the Estate of Humphries*, [1934] P. 78.

[51] When an affidavit on the foreign law sworn by an advocate has to be filed: for particulars of practice, see Tristram and Coote, pp. 71, 73.

[52] *In the Goods of Oliphant* (1860), 30 L.J.P. & M. 82; *In the Goods of Dost Aly Khan* (1880), 6 P.D. 6; *In the Goods of Abdul Hamid Bey* and *Re Achillopoulos*, both cited note 49.

[53] *In the Estate of Briesemann*, [1894] P. 260; *In the Goods of von Linden*, [1896] P. 148—but see below at note 58.

[54] Set out above, *sub* II (2).

[55] Compare cases cited by Dicey, notes (*t*), (*u*), (*x*), at pp. 513, 514.

[56] *In the Estate of Schiff*, [1915] P. 86; *In the Estate of San Pietro; In the Estate of Van Tuyll*, [1941] P. 16.

[57] *Re Fischer*, [1940] 2 All E.R. 252; *Practice Note* of October 18, 1939, as amended June 13, 1940.

normal practice is to give him his English title to the grant [58] and the corresponding powers. This means that the applicant has an option of relying on either English law or the law of the domicil.

(3) Much more delicate questions arise when the distribution of the estate of one of the missing victims of Nazism or of a person, one of the beneficiaries of whom is so missing, has to be considered.

Succession, testate and intestate, to movables is governed by the law of the deceased's last domicil.[59] It is a difficult problem of classification, however, whether or not the presumptions and declarations of death of the law governing succession are applicable, or whether the presumptions of death of English law, as the *lex fori*, or even those of a third law, which may govern the status of the deceased, are to be applied.

Presumptions are generally treated in English law as a matter of evidence and therefore as matters of procedure governed by the *lex fori*.[60] In continental law, on the other hand, they are, as a rule, regarded as part of the substantive law.[61] It would therefore be tempting to assume that an English Court, even when dealing with a case of succession governed by foreign law, would apply English presumptions of death.

The first examination of the problem has been made by Dr. O. Kahn-Freund,[62] with special reference to 'commorientes'. He pointed out that, in consequence of the application of the *lex fori*, a case which may have no contact at all with English law may ultimately come to be decided in accordance with it. His view is that there seems to be a growing realisation 'that English rules of evidence are frequently part of substantive law, and that in certain cases at least English Courts must apply principles of foreign law which English law would classify as part of the law of evidence'.

The problem has been dealt with anew in Wolff's *Private*

[58] See Tristram and Coote, p. 73—but not, if otherwise applied for: *In the Estate of Humphries*, [1934] P. 78.

[59] See Dicey, rules 193 and 194, and cases cited by Dicey.

[60] Dicey, rule 203, and cases cited there; as to the law of evidence, in particular see Cheshire, p. 643; Dicey, p. 851; Wolff, p. 236 f.

[61] See Bartin, *Principes de Droit International Privé I* 449: 'La Présomption légale est, pour sa nature même, étrangère à la lex fori'; compare Wolff, *German Private International Law*, p. 59; Jitta, *Dutch Private International Law*, pp. 293 ff.

[62] 6 Mod.L.Rev. (1942), pp. 89, 90.

International Law.[63] He maintains that an English Court would probably *not* apply a foreign presumption of death, and gives as an illustration a case where succession is dependent on the application of either the English or the German presumptions relating to commorientes, and assumes that the English Court would probably apply section 184 of the Law of Property Act, 1925, although succession proper would be governed by German law.

On the other hand, he points out[64] that continental legal systems, by their institutions of declarations of death or absence, create *not* only some rebuttable presumptions of life or death, but also immediate substantive effects on legal relationships. He states that they would have to be applied by an English Court as part of the *lex domicilii*. This is certainly correct.[65] Wolff's view of the probable attitude of an English Court with regard to presumptions, however, has been proved wrong, almost at once, by the excellent judgment of Uthwatt, J. (as he then was), in *Re Cohn*.[66] This case raised the very point Wolff gave as an illustration: the succession to a legacy given by a woman domiciled in Germany to her daughter, both of whom were killed by the same explosion in an air-raid on London. Whether or not the daughter was to be considered as having survived the mother depended on whether section 184 of the Law of Property Act, 1925, or the presumption of German law, according to which commorientes are considered to have died at the same time, applied. Uthwatt, J., said: —

> 'The question of survivorship is, in fact, opened up by the provisions of German law as to inheritance, and is formally not: "Did or did not Mrs. O. survive Mrs. C.?", but "Is the administration of Mrs. C.'s estate to proceed on the footing that Mrs. O. survived Mrs. C. or on the footing that she did not?". The purpose to which the inquiry as to survivorship is directed must be kept in mind. The *mode* of proving any fact bearing on survivorship is determined by the *lex fori*. The *effect* of any fact so proved is for the purpose in hand determined by the law of the domicil. The fact proved in this case is that it is impossible to say whether or not Mrs. O. survived Mrs. C. Proof stops there. Section 184 of the Law of Property Act does not come into the picture at all. It

[63] P. 280.
[64] P. 281.
[65] It is also consistent with the authority of *The Gaetano and Maria* (1882), 7 P.D. 137, discussed by Cheshire, pp. 645, 646.
[66] [1945] Ch. 5.

is not part of the law of evidence of the *lex fori*, for the section is not directed to help in the ascertainment of any fact, but contains a rule of substantive law directing a certain presumption to be made in all cases affecting the title to property. As a rule of substantive law the section is relevant where title is governed by the law of England. It has no application where title is determined by the law of another country '.

Re Cohn is certainly sound law. It disposes of both aspects of the problem :—

(1) It eliminates the danger of an application of the English law to cases for which it is not meant nor suited.[67] It adopts the trend of thought first mooted by Kahn-Freund by boldly rejecting the view that section 184 of the Law of Property Act, 1925, is a procedural matter and not a rule of substantive law.

(2) It opens the way to allowing due regard to foreign presumptions of death, and prevents any objection that the beneficiary's title, based on the *lex domicilii*, was established with the help of presumptions of death which are part of that law and not of English law.

The importance of *Re Cohn* is not confined to presumptions concerning commorientes. To determine the title of a beneficiary it is equally relevant to find out whether a person is presumed or declared to be dead according to the law governing succession, if and when his title depends on the death or survival of the person entitled or of another person with a better right. To adapt the wording of *Re Cohn* to that case :—

' The English administration is to proceed on the footing that X survived or did not survive at the relevant date. The only facts which can be proved by the English (or any other) *mode* of proving are that death is not certain, and that there were circumstances which lead the Court of the domicil to declare and/or its law to presume death. The *effect* of these facts and of that declaration of death are exclusively determined by *lex domicilii* '.

Accordingly, even a mere presumption or declaration of *absence* [68] is sufficient, supposing that the law of the domicil treats the absence as death and thus passes the ' deceased's ' title to others.

[67] May it induce the House of Lords to overrule, when occasion arises, *Leroux* v. *Brown* (1852), 12 C.B. 801, and *Huber* v. *Steiner* (1835), 2 Bing.N.C. 203, so justly attacked by Cheshire, pp. 636, 642, and others !

[68] See French and Belgian laws.

It remains to consider the case where the law governing succession does not classify presumptions and declarations of death as falling within the category of succession but within that of status, as a (provisional) withdrawal of the 'status of a living person',[69] and where those two categories are governed by different laws (*e.g.*, the law of the domicil and that of the nationality) according to the private international law of the deceased's last domicil. As it is always the title of the beneficiary which is to be determined,[70] it follows that that title should be established with the help of the rules on 'transmission'[71] as applied in the now settled practice of the English Court.[72] For example, suppose a refugee of German nationality who had acquired a domicil of choice in Austria was deported from that country and has not been heard of ever since, and suppose, further, that under Austrian private international law succession is governed by the law of the domicil, but presumption and declaration of death, as concerning the status of a person by the law of the nationality,[73] then the English Court should apply German law by way of 'transmission' from the Austrian law which governs succession to movables and is the relevant law from the point of view of English private international law.

The result of this examination is that, as a rule, continental laws, which are indeed better fitted to this type of case, determine who is to be considered dead or alive. The English rules apply only where English law governs succession either as *lex domicilii* or, owing to *renvoi*, in the case of British nationals domiciled abroad, or, as to immovables, as the *lex situs*.

(4) What is the position in case the title to a fund held under a settlement or other disposition *inter vivos* depends on the death or survival of a missing person?[74]

Certainly the principle of *Re Cohn* applies. Adopting the same method of classification as was employed in that case, we can easily reach the conclusion that it is the substantive law governing the legal relation in question that matters and

[69] See the discussion by Lewald, *Questions de Droit International des Successions*, *Recueil des Cours* (1925), IV, pp. 62, 63.

[70] *Re Cohn*, [1945] Ch. 5.

[71] 'Renvoi' to English law will rarely happen in cases involving the victims of Nazism.

[72] Among the chain of 'Renvoi' decisions which began with *Re Annesley*, [1926] Ch. 692; *Re Ross*, [1930] 1 Ch. 377; and *Re Askew*, [1930] 2 Ch. 259, it is *Re O'Keefe*, [1940] Ch. 128, which contains the application of the English principle to a case of 'transmission'.

[73] As suggested in Miss Schoch's Appendix to Cheshire, pp. 664, 665.

[74] We are excluding here cases in which the law of succession comes in on the ground that the claim is made in the rights of the missing person.

that it is for that law to determine the person entitled with or without the help of presumptions or declarations of death.

The relevant law may be that which governs marriage settlements or else the 'proper law' of whatever contract has been concluded, and this law may again 'transmit' the questions of death and survival to a third law. It is impossible to range over the whole field of possibilities. One case which may be frequent may be given as an illustration:—

Where a fund is held by a bank under a contract *inter vivos* and the title of a person to that fund is dependent on the death of another person who is missing, then it seems, as a general rule, the law of the place where the office of the bank is situated will be the proper law of that contract; English law if it be an English bank, but French law, *e.g.*, if the contract was made with the French branch of that English bank.

In this type of case, even if the missing person is a continental victim of Nazism, English law and its rules on presumption of death may more frequently be applicable than in succession cases relating to the same group of persons.

(5) A person who had been married can contract another marriage, valid under English law, only if his or her spouse is dead or the previous marriage has been dissolved in the *forum domicilii*.[75] Though this rule has its usual application in cases of divorce, there can hardly be any doubt that it refers to *every* dissolution.[76]

Does section 8 of the Matrimonial Causes Act, 1937, form an exception to this principle? On the face of it the section boldly states that 'any married person' may present a petition. It can, however, be asserted confidently that this right is given only to those who might bring a petition for divorce.[77] There was certainly no reason to grant the facilities of section 8 to persons domiciled and resident abroad. To grant them to resident wives of husbands domiciled abroad[78] might have been desirable, but such deviation from principle can not be considered to have been enacted implicitly.[79]

[75] See Dicey, rules 62, 63, 98, 99, 120, and cases cited by Dicey; the few exceptions mentioned by Dicey and those enacted by s. 13, Matrimonial Causes Act, 1937, and s. 1, Matrimonial Causes (War Marriages) Act, 1944, need not be discussed here.

[76] Dissolution of a valid marriage as distinguished from nullity and voidability; Cheshire, p. 33, says that 'dissolution is commonly known as divorce', which is hardly a correct terminology.

[77] Including cases where s. 13, Matrimonial Causes Act, 1937, or s. 1, Matrimonial Causes (War Marriages) Act, 1944, applies.

[78] Beyond the scope of the two enactments cited in notes 75 and 77.

[79] It is significant, too, that the procedure of s. 8, Matrimonial Causes Act, 1937, is adapted to divorce procedure; see last paragraph of the section.

Section 8 disposes of the problem of husbands of female victims of Nazism who have acquired a domicil of choice in this country and wish to remarry.[80] More difficult is the situation of wives of missing victims.[81] Some continental laws are helpful. Dutch law is similar to English law.[82] If the *lex domicilii* is German law, a declaration of death will help, because a second marriage contracted by the other spouse automatically dissolves the former marriage; this effect is independent of the fact whether the missing spouse is actually dead or not.[83] [84] Consequently the second marriage is not bigamous.

In cases, however, where the law of the domicil [85] does not give such effect to a declaration of death (or of absence),[86] that law does not enable the 'survivor' to contract a valid second marriage. A *presumption* of death or absence is not enough in itself. This is very much to be regretted, because in fact, under the conditions now existing, the chance of a missing victim reappearing is a very slender one.

Actually, an informal practice seems to be developing, both in cases where English law, by way of section 8 of the Matrimonial Causes Act, 1937, has provided the means to making the validity of the new marriage certain, and in other cases. A declaration of the spouses that 'they do not know of an impediment to the marriage' [87] is freely given by persons whose former spouse is missing and most likely dead. Also, it is believed that the Registrar, if the position is explained to him, is not infrequently satisfied with such evidence as can be procured, so as to make the death of the missing spouse reasonably certain, *e.g.*, proof that he was deported to a notorious extermination camp and did not return to his former residence. This practice, moreover, has a certain justification in decided cases according to which the Court will not question the validity of a second marriage, being unexceptionable in

[80] For the affidavit to be brought in support of the petition and the discretion of the Registrar as to substituted service, see Latey, pp. 86, 492, 512.
[81] Or such husbands as are not domiciled in this country but wish to marry here.
[82] See Burgerlijk Wetboek, ss. 549, 550.
[83] See Law 16 of the Allied Control Council of February 20, 1946, s. 38.
[84] As to proof of the foreign act by foreign documents, compare note 38, *supra*; the weight of the foreign document as evidence of the act will be determined by the foreign law: Dicey, p. 851; *Abbott* v. *Abbott and Gody* (1860), 29 L.J.P. & M. 57.
[85] Which again may 'transmit' the question of the dissolution of the first marriage to a third law, if it considers the relevant act to be determined by that third law as the law of the status.
[86] As can be taken by implication from s. 139 of the French and Belgian Civil Codes.
[87] See note 27 and 28.

form and duly consummated, until some evidence is adduced that the missing spouse has survived and the second marriage is in fact a nullity.[88] The danger remains, however, that the second marriage may turn out to be void and bigamous, and therefore criminal.[89]

W. Breslauer.

[88] *Tweney* v. *Tweney* (1946), 62 T.L.R. 266; compare *Spurgeon* v. *Spurgeon* (1930), 46 T.L.R. 389, and, relating to maintenance cases and expressly referring to the presumption that a person missing for seven years be considered dead: *Hogton* v. *Hogton* (1933), 103 L.J.P. 17; *Chipchease* v. *Chipchease*, [1939] 3 All E.R. 895.

[89] It is a good defence to an indictment for bigamy that the spouse of the party indicted has been continually absent from the other for the space of seven years then last past and has not been known to the other to be living within that time: Offences against the Person Act, 1861, s. 57.

SOME FEATURES OF SWEDISH COLLECTIVE LABOUR LAW[1]

In Sweden the broad outline of industrial relations is much the same as in England. Both countries have large organisations of employers and workers which deal with one another on the basis of collective bargaining; in both countries State interference regarding the basic terms of employment, particularly wages, is kept within the narrowest possible limits; in England as well as in Sweden both parties in the labour market are anxious to retain the right of direct action as an ultimate resort in case of disagreement. Therefore it must be borne in mind that though some features of the Swedish industrial relations system described in the following paper differ considerably from what prevails in this country, the functioning and the results achieved are largely the same.

It is especially on the legal side, the side with which the present paper is mainly concerned, that the differences are pronounced. They are, I may say, due to a large extent to the peculiarities of the English legal system. The English trade union law bears in all essentials the impress of the fight of the trade unions to secure a legal basis for their activity. The principles of the common law, especially as laid down in the doctrines of conspiracy and restraint of trade, were mainly hostile to collective activity for trade purposes. The efforts of the trade union movement had to be directed towards the problem of avoiding the consequences of various judicial decisions founded on these doctrines. The way that was chosen was—while conferring legal status on the trade unions—to protect them by statute from the application particularly of the said common law doctrines. The English trade union legislation is mainly a fence, erected piece by piece as the need arose, against the common law, which did not answer the demands of the trade unions. If by the rules alluded to (*e.g.*, section 3 of the Conspiracy and Protection of Property Act, 1875, concerning criminal conspiracy, and section 3 of the Trade Union Act, 1871, concerning restraint of trade) certain

[1] An American book on the subject, which has been of great help to me, should be mentioned: *The Government of Labor Relations in Sweden* (1942), by J. J. Robbins. The Legislative Series of the International Labour Office contains translations of the statutes dealt with, but I have not everywhere accepted these translations.

privileges, or immunities, can be said to have been granted to the trade unions, this is, as far as I can see, entirely due to the fact that the common law is regarded as a more or less fixed body of rules, which, though set aside by statute, still 'exist', and can be revived through the removal of the statutory rules, and which have to be applied as soon as the facts in a certain case are not strictly covered by the words of the statute. But the English trade union legislation goes a step further. By section 4 of the Act of 1871 a series of important matters is withdrawn from the jurisdiction of the Courts. The term 'immunity' seems to me far more appropriate when used to describe this fact. While in the former case of immunity certain rules of substantive law are made not applicable to trade unions, a fact which in reality involves only an amendment of the law, in this case the whole judicial system is set aside, without special provisions for anything to replace it. The result is that the relations between the organisations of the labour market are of a fundamentally extra-legal character. So there is no legal regulation concerning collective bargaining and collective agreements (except for certain industries). This gives the English trade union law system its peculiar colouring.

In Sweden the starting-point, as well as the development, has been rather different. The trade union movement has been faced with fewer difficulties, especially on the legal side. It could perhaps be said without exaggeration that the Swedish trade union legislation starts where the English legislation ends.

Before embarking further upon this proposition, a few words must be said about the organisations in the labour market. In Sweden a real trade union movement did not exist until the last decades of the nineteenth century. It grew, however, rapidly and steadily. Most trade unions are affiliated to the Confederation of Trade Unions (LO, formed in 1898), which includes a membership of more than one million out of a total population of six-seven million, probably the largest relative membership in the world. The other trade unions are not of much importance. The employers' associations that arose as a reply to the trade unions have not reached the same degree of unification. The largest organisation, the counterpart to the LO, is the Swedish Employers' Federation (SAF, formed in 1902), which comprises employers mainly in industry with a total staff of roughly 450,000 workers. There are other fairly important employers' organisations, which to a certain extent co-operate with the SAF. The adoption by the

employers of the same weapon, namely, combination, implied, in so far as their organisations were not merely militant bodies but engaged also in negotiations with the trade unions, some recognition of the method of collective relationship. The principle of collective bargaining, though much opposed in the beginning, was comparatively soon accepted by the employers and is now the foundation of the relationship in the labour market. Negotiations are generally conducted on a nation-wide scale. At the end of 1943 some 1,100,000 workers were covered by collective agreements. Although bitter fights are no exception, understanding and co-operation seem to play an increasing part, and as a whole it can be said that Swedish industrial relations have reached a certain degree of maturity.

Returning to my introductory proposition, I would first point out that the Swedish trade union movement arose only when customs of collective relationship in the labour market had already been developed in other countries.

Secondly, Swedish law has never in principle raised special hindrances against combined activity, *i.e.*, collective action is seldom regarded differently from individual action, and then only when specially provided for.[2]

So, in order to give a short survey of the legal background to the rise of trade unionism in Sweden, it must first be said that the right of labour to combine and organise, and the legality of the trade unions, never raised special difficulties. On the other hand, there has not yet been passed any statute containing positive regulations as to trade unions as associations. In respect of their legal status, on which more will be said later on, they have always been on an equal footing with most other associations, *i.e.*, they are regarded as legal persons as soon as their social existence is manifest.

Nor has the collective activity of the trade unions met with any difficulties as to legality. The principle of every man's right to withdraw his labour has been applied also when action was taken in combination, and the legal restrictions on industrial warfare were mainly those of the Criminal Code, including a special provision, now repealed, regarding picketing, which has been the only instance of legislation directed exclusively against the activity of labour during the

[2] It is interesting to note that in Sweden too there has been an instance of anti-combination legislation. There was in force until 1846 a statutory prohibition of combined activity for the raising of wages in certain trades. It was repealed together with other pieces of guild legislation under the influence of economic liberalism.

period under consideration.[3] Likewise the law did not put anything in the way of collective bargaining, *i.e.*, the practice of negotiating over and settling working conditions through associations. True, the usage of regulating working conditions by means of collective agreements developed without certain knowledge of their legal effects. Disputes on these matters were seldom referred to the Courts, and it was doubtful whether the agreements should be regarded as legally binding contracts or as peace treaties with merely factual significance. The question was solved in a case of 1915, when the Supreme Court adopted the first-mentioned view and held that a trade union was liable for damages for breach of contract. Therefore a term more corresponding to the Swedish conditions is that of *collective contract*.

It follows from this that labour had obtained the basic requirements for collective trade activity without any legislative interference. What could be achieved by legislation was a further development and clarification of the practices that had grown up. It proved difficult, however, to bring about any legislation on the matter. Many proposals failed, and not until 1928 did the attempts to that end meet with success.

Consequently, when in that year the *Collective Contracts Act* was passed, it did not create the collective contract. Even so, it was not merely a codifying statute. It introduced some new features of great importance, one of its main objects being to promote industrial peace. It is based on the principle that disputes on legal questions should be settled without resort to hostile action. The Act is now the framework of the law concerning collective contracts. On the same occasion, by the *Labour Court Act*, a special Labour Court was established, which has to deal with disputes concerning collective contracts. More recently its jurisdiction has been extended. These Acts, carried through by a Right Wing Government, were strongly opposed by the trade unions, which feared that the result would be severe restrictions on their free activity. However, their opinion soon changed, and now the jurisdiction of the Labour Court is supported by both sides. Equally, in 1936, the right of collective bargaining was confirmed and extended by the

[3] By this provision, enacted in 1899 as an amendment to the Criminal Code, the attempt, by violence or threat, to compel any person to take part in a stoppage of work, or to prevent any person from resuming work or from accepting an offer to work, was made a criminal offence. According to the interpretation of the Supreme Court, ' threat ' means threat to do an unlawful act. The provision was rather unique in Swedish law, as at that time attempt was penalised only in a few instances. It was repealed in 1938.

Right of Association and the Right of Collective Bargaining Act (hereafter called the 1936 Act), which is also administered by the Labour Court.

Many other attempts to legislate in this field have broken down. Thus in the 'twenties and 'thirties the practices of industrial warfare were made subject to extensive inquiries, and attention was called particularly to the need for protection of outsiders from injuries caused by industrial unrest. What happened, after the failure of all legislative endeavours, shows an important new feature of Swedish industrial relations, a new method of self-government in the labour market. After prolonged negotiations between the SAF and the LO, a document, the *Basic Agreement of* 1938, was drafted, which contains among other things many of the provisions designed to be part of the statute that was never passed. The agreement can be adopted as a collective contract by the respective trade federations. So by way of collective bargaining the parties imposed on themselves restrictions which could not be accepted by way of legislation.

After this summary of how the present collective labour law emerged—not without struggle and strife, but still in natural progression without set-backs—I shall now proceed to deal with the material thus set out, in the following order: After some remarks on the legal status of the associations I shall give an account of the law concerning collective contracts, which is the nucleus of the system, thereafter turn to the law concerning the rights of association and of collective bargaining, and finally make a summary of the Basic Agreement. I shall pay special attention to the regulations aiming at the promotion of industrial peace.

THE LEGAL STATUS OF THE ASSOCIATIONS

I have already mentioned that the legal position of the associations in the labour market is undefined by statute. They are as a matter of course regarded as legal persons as soon as rules have been adopted and a board of executive officers has been appointed. They can own property, undertake obligations which bind only the association, not its members, they can sue and be sued as corporate bodies, and for this purpose no registration is needed nor any public control instituted.[4] An

[4] The position is quite different as far as companies and some other organisations with commercial objects are concerned. They must be incorporated.

officer who on behalf of the association enters into an obligation inconsistent with the rules of the association, binds the latter, provided the other party acts in good faith as to his authority. General principles of agency are applied, which means that he naturally incurs liability in relation to the association for the damage caused by his act. There are no special restrictions as to the objects of a trade union. Nothing prevents the unions from applying their funds for political purposes. In fact, the connection between the Social-Democratic Party and the LO is very close. Many unions have affiliated with the party collectively.

THE COLLECTIVE CONTRACT AND THE LABOUR COURT

A collective contract, to come under the Collective Contracts Act, 1928, must have certain qualifications (section 1). It must be drawn up in writing, but the requirements as to form and completeness are not rigorous. The parties to it must be an employer, or an association of employers, and a trade union. Consequently there must always be an association on the workers' side. Yet, if only a group of individual workers proceeds to enter into such a contract, that contract is valid, but the Act does not apply.[5] Further, the collective contract must contain regulations of conditions of employment to be applied to contracts of employment or regulate the relationship between employers and workers in other respects.

The rules that generally are included in a collective contract may be divided into different categories.

(1) Rules concerning only the relationship between the parties to the collective contract; in the first instance those governing the collective contract itself, its termination, etc., and, secondly, the rules of procedure for settlement of disputes, etc.

(2) Rules designed to be incorporated in the individual contracts of employment, *i.e.*, those concerning the terms of employment. The fact that the individual contract receives most, and sometimes all, of its contents from the collective bargain is generally referred to as the normative effect of the collective contract.

[5] There are thus in fact in Swedish law two sorts of collective contracts subject to different legal rules. The law as in force before the passing of the 1928 Acts applies to the collective contracts entered into by a group of individual workers (cf. below at p. 146). I do not think these contracts are nowadays of any importance. Although they fall outside the scope of the Collective Contracts Act, the Labour Court has jurisdiction over them.

(3) There can also be a third category of rules, those laying down requirements in respect of the workers to be employed, *i.e.*, conditions for engagement. Such are for example rules that there should be a certain relation in number between different categories of workers, or that only organised workers, or only workers organised in a special trade union, should be employed (closed shop clauses, in Sweden called organisation clauses). These are rules for the conduct of the individual employer (in case of shop agreements they merge with the rules under (1)), but unlike the terms of employment they cannot be incorporated in the contract of employment.[6]

The normative effect of the collective contract involves the invalidity of a departure from the terms of employment laid down in it, unless the departure is deemed to be permissible under the collective contract (section 3). The presumption is that the collective contract lays down standard, not minimum, conditions. But generally a variation for the benefit of the worker is expressly permitted under the collective contract, *e.g.*, the wage rates agreed are expressly referred to as minimum wages. Therefore the principle of the Act has no great importance in actual fact.

The collective contract is binding not only on the association that entered into it but also on its members (section 2), which term includes both branches and private members, of course only in so far as they fall within the industrial groups and district specified in the contract. A member is bound by the collective contract whether he has joined the association before or after the conclusion of it, provided he is not already bound by another, and his liability does not come to an end only because he resigns his membership. He can release himself only by giving separate notice according to the stipulations in the contract. A member can sue on the collective contract, but only if the association which has concluded the contract has refused to do so on his behalf, and whenever a member is sued in the Labour Court the plaintiff must bring his action against the association also (Labour Court Act, s. 13).

An employer bound by a collective contract has normally to apply the same conditions to the employment of unorganised

[6] In Scandinavian doctrine, the categories (1) and (3) are generally treated as one, having regard to the contractual function as distinguished from the normative function of the collective contract. I follow the distinction adopted by Dr. Kahn-Freund (Mod.L.Rev., Vol. VI, 1943, at p. 116) between terms of employment and conditions for engagement, but I confine the term 'normative' to the rules capable of being incorporated in the contract of employment.

workers. These, of course, have no legal claim to the union rate, but the trade union which is a party to the collective contract can sue him for breach of that contract. The same principle applies to workers: they are not allowed to accept employment on terms inconsistent with the collective contract, but this question does not arise where, as in the contract for the mechanical workshops, the application of the contract is confined to the workshops belonging to the members of the employers' association concerned.

What is the position in the sections of industry that are not covered by the contracts concluded by the large organisations? There is no provision for the extension of the normative effect of a collective contract to outsiders. Yet the terms of an agreement covering a substantial part of an industry are often complied with. Since organisation has not reached the same degree on the employers' side, it often happens that organised workers are confronted with an unorganised employer. Then, as a rule, a separate collective contract on the terms of the national or regional agreement is entered into. The employer can, for example, sign a document in which he undertakes to comply with a specified collective contract. This document, which takes all its contents from the contract referred to, is valid as a collective contract. Often, however, some special regulations are added. Another existing method is for the employer simply to sign a printed copy of a collective contract.

The most important contractual effect of the collective contract is that it imposes on the parties an obligation to keep the peace. In Sweden the distinction—well known in international law—between disputes as to legal rights and conflicts of interests is of fundamental importance, although it has not been strictly applied in the drafting of the Collective Contracts Act. Disputes as to legal rights are subject to judicial settlement by the Labour Court, and the parties are under a legal obligation to abide by its decision. This is the most important statutory restriction on the right to take direct action; it should be remembered that this restriction is bound up with the existence of a collective contract. The *peace obligation*, laid down in section 4 of the Act, is compulsory; unlike most other provisions of the Act, it cannot be contracted out, but the parties are at liberty to undertake a more extensive peace obligation.

Section 4, which enumerates the cases in which hostile action in an industrial dispute is prohibited, reads as follows (first paragraph):

Employers or workers who are bound by a collective contract shall not, during the period of validity of this contract, take part in a stoppage of work (lockout or strike), blockade (picketing), boycott, or other hostile action of a similar nature—

1. On account of a dispute respecting the validity, existence, or correct interpretation, of the collective contract, or on account of a dispute as to whether a particular act constitutes a violation of the collective contract or of this Act;

2. In order to bring about an alteration of the terms of the collective contract;

3. In order to enforce a clause designed to come into operation after the expiration of the present contract;

4. In order to assist others in cases in which the latter are not themselves allowed to resort to hostile action.

Thus, during the term of a collective contract, the parties are allowed to resort to hostile action in assistance of others (sympathetic action) provided the primary conflict is lawful. They are allowed to fight in open action for the terms of a new contract, but not as long as they are bound by the old one, and they are likewise allowed to fight for something that has not been settled in the present contract as long as their action cannot be regarded as an attempt to alter the terms of the contract. This last proposition involves, of course, difficult questions as to the construction of a contract.[7]

It must be borne in mind that the peace obligation applies irrespective of a breach of contract by the other party. An alleged breach of contract must be referred to the Labour Court, if the dispute cannot be settled by means of negotiations, and the Labour Court can alone release the injured party from the obligations connected with the contract, *e.g.*, release him from the peace obligation or abrogate the contract altogether (besides giving redress in the ordinary way). This is one of the most important innovations brought in by the Collective Contracts Act (section 7). Even before the Act was passed, when general principles of the law of contract were applied, a party was prohibited from taking hostile action for

[7] A strike for the closed shop during the term of a collective contract is illegal as an attempt to alter the terms of the contract, even though the point was never raised in the course of negotiations. The reason is this. The Labour Court implies an association clause of a certain content (see below p. 149) in every collective contract that is silent on the matter, and recognises, with that proviso, a right on the part of the employer to have a free hand in management, including the right to employ and dismiss workers at his own discretion.

the purpose of altering the terms of a collective contract during its period of validity (pacta sunt servanda), but in case of real or supposed breach of contract the injured party could *at his own risk* break off the economic relationship (by stoppage of work or by rescission of the contract). Of course, his interpretation of the contract might not be that of the Court, *e.g.*, the other party might be held not to have committed a breach of contract, or at any rate not a breach serious enough to justify the rescission, with the result that the rescinding party might incur liability. The law as in force before the 1928 Act still applies to the collective contracts which, being concluded not by a union but by a group of individual workers, do not come under the Act (cf. above, p. 142, and note 5). Under the Act those bound by a collective contract can claim redress only by means of legal proceedings; direct action as a countermeasure in such a case constitutes a violation of the peace obligation. Thus the workers must, for example, obey the orders given by the employer, even if they think that he is not entitled under the contract to require the carrying out of these orders. Only in cases of very flagrant breaches of contract can direct stoppage of work be resorted to.

The second paragraph of section 4 deals with the questions of—Who is bound by the peace obligation? and What are its contents? As has been pointed out, a collective contract binds not only the contracting parties themselves but also, if they are associations, their members. The peace obligation, however, is extended even further; to a certain extent it applies upwards also, *i.e.*, to the top organisations, to associations whose members have entered into a collective contract. The provision reads: ' If an association *or a member of an association* is bound by a collective contract, the association shall not arrange for or otherwise bring about any hostile action which under the first paragraph is unlawful, nor take part in any unlawful action taken by a member, either by rendering assistance or in any other way '. The duty so far is purely negative: it commands abstention from action. The parties themselves, however, have to be active in a positive way. The provision continues: ' An association which is *itself bound* by a collective contract shall moreover be bound to endeavour to prevent its members from taking unlawful action, or, if unlawful action has already been taken, to endeavour to induce them to undo it '.

The instrument for the settlement of disputes in which

hostile action must not be taken is, as I have already mentioned, the *Labour Court*. No other Court has jurisdiction in these matters, but the parties are allowed to refer the dispute to arbitration (Labour Court Act, s. 11), and wherever negotiations or other means of settlement of disputes are prescribed by a collective contract, the Labour Court does not entertain the action until the plaintiff has made sufficient efforts to settle the dispute by means of those arrangements (section 14).

The special Labour Court was set up to satisfy the need for a tribunal possessing inside knowledge of the matters it was to deal with. Still more urgent was the need for a swifter adjustment of the disputes in question than could be effected by the ordinary Courts. Therefore only one Court was established for the whole country, in Stockholm, and no appeal is allowed. The perhaps somewhat surprising fact that only one Court serves a country of the size of Sweden must be seen in the light of the type of procedure adopted (see below). The Labour Court consists of a chairman and six other members, two of which represent the SAF and two the LO. They are all appointed by the Crown. The chairman and one of the impartial members, who is his deputy, must be lawyers. The present chairman is a former Judge of the Supreme Court. The procedure in the Labour Court is based on more modern principles than those which are or at least were until recently applied in the ordinary Courts. After a preparation in writing there is a main hearing, which should, if possible, be concluded in one day. Judgment is given in writing and should contain an exposition of the grounds. Actually, the opinions of the Labour Court are stated much more fully than is usual in Swedish Courts, and the reports of the cases are a fruitful source for the student of Swedish labour law.

The Labour Court is entirely a Court of Law and cannot be resorted to for determination of wage rates, etc. It has, therefore, a position rather different from that of the Industrial Court in this country, which mainly acts as a body for arbitration in relation to conflicts of interests. As far as the disputes in which direct action is permissible (*i.e.*, most conflicts of interests) are concerned, the methods of settlement show greater similarity with those customary in this country. I shall not give any account of these methods. So much may be said, however, that in this field State interference is less pronounced than in this country. The State only provides for a machinery of mediation. There is nothing like the wages

council system, nor any other kind of minimum wage legislation. Hours of work, on the other hand, are subject to statutory rules applicable also to adult workers.

The task of the Labour Court is to deal with and decide cases relating to collective contracts. The definition of these cases involves the main boundaries of the jurisdiction of the Court.[8] It is contained in section 11 of the Labour Court Act, which should be compared with section 4 of the Collective Contracts Act. The principle is that wherever hostile action is prohibited, settlement by the Court is provided for.

Thus the Labour Court has jurisdiction over disputes concerning:

1. The validity, existence or correct interpretation of a collective contract;

2. The question whether a particular act constitutes a violation of a collective contract or of the Collective Contracts Act; or

3. The legal effect of an act alleged to constitute a violation of a collective contract or of the said Act.

The Labour Court has at its disposal only civil sanctions. The sum of damages that can be inflicted on an individual workman is limited to 200 Swedish crowns (about £12). When assessing the damages the Court has to take into consideration not only the financial loss suffered by the plaintiff but also his non-pecuniary interest in the observance of the contract in general and other similar circumstances (Collective Contracts Act, s. 8). This kind of damages is often the only possible sanction, *e.g.*, in case of breach of the conditions for engagement. It has in fact some resemblance to a fine or penalty, although in law it is a civil remedy.

THE RIGHTS OF ASSOCIATION AND COLLECTIVE BARGAINING

I have already spoken of what can be called the right of association in a general sense, or what is more often referred to as the freedom of association, *i.e.*, every citizen's right, without hindrance from the State, to form and to join associations, or, from another point of view, the right of associations to exist and to act. I shall now deal with the right of association in a more special sense adopted in labour law. Generally speaking, this right involves the question of the

[8] As I have mentioned, the jurisdiction of the Labour Court has later been extended to disputes under certain other Acts, the most important of which is the 1936 Act concerning the rights of association and collective bargaining.

extent to which a person can, in his legal relations with others, lawfully let his actions be determined by the fact whether these persons belong to a certain association or not.[9] The interests that usually clash in this connection are, on the workers' side, the desire to safeguard the integrity of their bargaining units and, if possible, to obtain the closed shop, and, on the employers' side, the wish to have a free hand in management, including the right to employ and dismiss workers at their own discretion.

Before the passage of the 1936 Act there was no legal duty imposed on employers to bargain with trade unions on terms of employment, and there was nothing to prevent an employer from using his economic power to influence his workers against joining a union. But this position at law had no significance for the bulk of industry, for wherever a collective contract had been concluded the Labour Court held that the recognition of the right of association was implied in the agreement. Usually the collective contracts contained—and still contain—a clause saying that 'the right of association shall remain inviolate on both sides', but, whether actually expressed or not, discrimination because of membership of, or activity in, a trade union constitutes a breach of the collective contract, and the offender is liable in damages.

A few words may be said on the origin and meaning of the above clause. It was agreed upon after negotiations between the SAF and the LO in 1906 as a limitation on the employers' general right to employ and dismiss workers at their own discretion and to engage workers irrespective of whether they are organised or not. In the compromise of 1906 the employers in the SAF waived the right to discriminate against workers in the way above mentioned (a right which, as has just been pointed out, the Labour Court later held to have been renounced, in relation to the other party, merely by the conclusion of a collective contract). The employers must not, to the detriment of the worker, let their actions be determined by the fact that the latter belongs to a trade union, works for it, etc. There is nothing to prevent them from favouring trade unionists or from discriminating against a non-unionist, but ever since 1906 they have refused to yield to the demands of

[9] This formulation is derived from the opinion of the Labour Court in a case of 1937. Another way to put the question is this: 'To what extent is the right of combination for trade purposes protected against restrictions imposed by individuals?' See International Labour Office, Studies and Reports, Ser. A, No. 27, Freedom of Association, (Geneva 1927), p. 20.

the trade unions for the closed shop. This was the point which, in the compromise of 1906, the workers had to concede. According to the constitution of the SAF no member is allowed to enter into closed shop agreements, but outside this organisation they do exist, and their legal validity as such (cf. below, p. 152) has never been doubted.

The purport of the 1936 Act was then, in a way, mainly to turn a merely contractual right into a statutory right, thus conferring the same right upon employees who are not covered by a collective agreement. The main reason for passing the Act, however, was not so much a desire to protect the trade unions of the manual workers as the need to strengthen the position of the salaried employees.

Owing to discord as to what should be the content of the right of association, the 1936 Act in this respect simply adopted the formula that 'the right of association shall remain inviolate', leaving it to the Labour Court to decide what it might include. The Court mainly continued on the same lines as before. Finally, in 1940, by an amendment to the 1936 Act, a legal definition was inserted, which adopted the Left Wing view of the matter. The Right Wing proposal had been made to include also the right to *remain unorganised*, thus giving to individuals protection against the unions. This would have implied a prohibition of the closed shop. The object of the amendment—which is in accordance with the practice that the Labour Court had quite naturally developed when interpreting the association clause, expressly or impliedly contained in the collective contracts—was to regulate the matter *only in so far as was necessary for the sake of safeguarding the right of collective bargaining*. For the purposes of the Act the right of association is thus defined as 'the right of employers and employees to belong to an association [for industrial purposes], to profit by membership therein, and to work for an association or for its formation'. It is a violation of the right of association if, on the part of employers or employees, measures are taken *against a person on the opposite side* in order to induce him not to join, or to resign from, an association, or not to work for an association or for its formation. It is likewise a violation to discriminate against a person ('take measures resulting in injury to a person on the other side') because of his membership, etc. (section 3). It should be noticed that the right of association is vouchsafed not only to the employees but to the employers as well, and that this right is conferred only in relation to the other party. The Act does not give

any protection to employers against employers or to workers against workers. In other words, the object is solely to strengthen the bargaining units in the labour market.

The introduction in 1936 of a statutory right of association irrespective of the existence of a collective contract entailed some complications in connection with closed shop clauses in cases of organisational disputes.[10] I shall not go into any detail on this intricate matter. The Swedish principle is that the employer is under an obligation to observe the right of association of all his employees, irrespective of what kind of trade union they belong to. If, in fulfilment of a closed shop clause in an agreement with one union, he dismisses a worker belonging to another union, that will constitute a violation. This rule is expressed in the amendment of 1940 in the following way: 'The right of association shall be deemed to be infringed even if the measures in question have been taken under a clause of a collective contract or any other contract'. A closed shop clause is null and void in so far as it is inconsistent with the statutory right of association.

The right of association is defined in the Act as a right of the *individual* employer and employee. There is a violation only if an individual has suffered harm in this respect. The association as such has no independent 'right of association' (this term now used in a wider sense than in the Act). For example, a trade union cannot successfully sue an employer on the ground that he systematically avoids engaging workers belonging to it, or that he persecutes it with hostile propaganda. This might, however, at least in certain circumstances, be possible if a collective contract governs the relationship. Another question is how far an association has an independent *right to take legal action* on the ground of a violation of the right of association. Already before the passing of the 1936 Act such a right was deemed to be implied in the collective contract, and it was held that a union could sue an employer even when the act complained of was directed against an outsider, provided the union could show that its activities had been encroached upon thereby. By the 1940 amendment this remedy was raised to a statutory level (*i.e.*, it operates even if no collective contract has been concluded): 'An association

[10] These questions do not arise in the larger part of industry for reasons already intimated. Employers belonging to the SAF are forbidden to conclude such agreements. Inter-union disputes within the LO are settled internally. Yet there has been a considerable amount of litigation on the matter arising out of the activities of the 'syndicalist' trade unions, small in number but aggressive, in competition with the LO affiliated unions.

shall not be bound to tolerate any infringement of the right of association which constitutes interference with its activities '.

The sanctions of the 1936 Act are civil only. It provides for neither administrative nor penal methods of enforcement. A notice of dismissal, or other similar act, or any contractual clause (*e.g.*, a closed shop clause, cf. above, p. 151) which violates the right of association is null and void (section 3). The chief remedy is an action for damages. Often both the individual and the association can recover damages. An association can also incur liability if it fails to take appropriate action (further described in section 22) against a member who violates the right of association.

A particular kind of hostile action, directed against individuals but aiming at existing or contemplated combinations, has thus been eliminated as a lawful means of industrial warfare. It appears from what has been said that, throughout this development the law applicable to relations governed by collective contracts has served as a pattern for a more comprehensive regulation of the matter.

I shall be very brief as to the other subject of the 1936 Act: the right to bargain collectively, or, more literally, the right to negotiate, to which the right of association is in fact a corollary. It is defined as the right to require negotiations respecting the regulation of conditions of employment and the relations between employers and employees in general, a right which ' shall entail on the other party the obligation to enter into negotiations ' (section 4). It is, in short, the right to be bargained with. The right to negotiate is conferred, on the one hand, on the employer, or the employers' association of which he is a member, and, on the other hand, on the employees' association of which the employees in question are members.[11] Broadly speaking, the obligation to negotiate involves the duty of attending, either in person or by proxy, at the meeting for negotiations, and where necessary of making proposals, supported by arguments, for the settlement of the issue. This, of course, does not imply any obligation actually to enter into a collective contract.

These rather vague provisions are not subject to sanctions in the usual course, but if they are not complied with the State machinery for mediation comes into play. A mediator

[11] More than one union can thus have a right to negotiate with the same employer. There is no majority rule as under the National Labor Relations Act in the United States.

has certain means of compelling the parties to fulfil their duty as to negotiations.

The most important consequence of this part of the 1936 Act is that an employee has a statutory right to be represented by his union in negotiations with his employer.

In this connection it may be of interest to mention that, according to the rules of the LO, the executives of all its affiliated unions shall have the power to make the final decisions as to the concluding of collective contracts. The ballots that are often taken in the course of negotiations are merely advisory.

THE BASIC AGREEMENT

The Basic Agreement, concluded in 1938 by the SAF and the LO, inaugurated a new trend in Swedish industrial relations. Apart from the compromise of 1906,[12] it is the first collective agreement entered into by the top organisations themselves. It has later been followed by other agreements on different matters.

The Basic Agreement, however, is not an ordinary collective contract. It is not legally binding on the top organisations themselves unless adopted as a collective contract by the respective trade federations. Only on two points did the parties assume obligations directly by concluding the agreement: (1) to perform duties within the Labour Market Board, a permanent body for negotiations set up under the agreement, and (2) to endeavour to have the agreement voluntarily accepted as a collective contract between their affiliates. At the beginning of 1945 it covered roughly 300,000 workers.

The Basic Agreement contains five chapters dealing with (1) the establishment of the Labour Market Board; (2) a uniform system of negotiation for the settlement of labour disputes; (3) the establishment of a general practice to be followed with respect to permanent and temporary dismissals of workers; (4) the abolition of certain hostile actions, and (5) the adoption of a special system for the handling of labour conflicts touching upon functions essential to the community. I shall deal with each of these points in turn.

(1) The Labour Market Board consists of three members from each of the top organisations. In general it has to deal with questions of particular importance to the labour market.

[12] Although no doubt a collective agreement, the compromise of 1906 (see above, p. 149) is seldom referred to as such. Its main outcome was an alteration of the rules of the SAF, giving way to the association clause.

Its special functions in carrying out the provisions of the agreement will appear from what is said below. Only in certain cases has it got power to make binding decisions as a board of arbitration.

(2) Already prior to the Basic Agreement there were, of course, inserted in the collective contracts various provisions for the settlement of disputes by negotiations. The rules of procedure thus prescribed were, however, often badly drafted, and a more uniform scheme was deemed desirable. The regulations contained in the agreement apply to all sorts of disputes, whether direct action is legally permissible or not, with certain exceptions, mainly those provided for in other chapters of the agreement. These regulations do not apply to cases where the dispute goes beyond details to the making or renewal of an entire collective contract. The procedure is in two stages. First, there are local negotiations between the parties directly concerned with the participation of the local organisations wherever such exist, and, if these negotiations fail to lead to an agreement, there are, secondly, central negotiations between the respective trade federations. This chapter further contains rules to the effect that, after the lapse of a given time, a question can no longer be raised by way of negotiation.

The negotiation procedure is bound up with an obligation on the parties to refrain from hostile action. A dispute within the jurisdiction of the Labour Court cannot be brought before the Court unless and until the parties concerned have complied with their duty to try to settle it by negotiation (Labour Court Act, s. 14). With respect to these disputes the peace obligation applies according to the principles of the Collective Contracts Act. The Basic Agreement lays down a peace obligation in respect of *all* disputes that come within this chapter. It provides that direct action must not be resorted to before the party has fulfilled his obligation to negotiate and unless the action has been decided or approved by the respective trade federations. This prohibition on local unions and single employers to take independent action applies also to sympathetic actions, which otherwise are exempted from this chapter.

(3) The employer has a general right, recognised by the Labour Court, to dismiss workers on notice at his own discretion, the most important exception being his obligation to observe the right of association. The Basic Agreement does not abolish this right to dismiss, but puts considerable limitations on its exercise, the object of these being to confer on the

employees a certain security of tenure. A special negotiation procedure is provided for, which ends in the Labour Market Board. In dealing with a matter of this kind the Board must consider the interests of both sides, and must seek to arrive at a unanimous opinion, which has in fact so far been possible in all but one case which is of little importance. It follows from what has been said that the decision of the Board is not binding on the employer.

(4) The chapter which puts limitations on hostile action is of special interest. To a large extent it concerns outsiders, owing to the fact that this part of the agreement was drafted mainly in accordance with proposals for a statute on the matter, the main object of which would have been the protection of outsiders in industrial disputes. The forms of hostile action concerned are not only the collective ones: stoppage of work (strike and lockout), blockade (picketing), boycott and similar actions, but also the non-collective termination of contracts of employment for the purpose of coercing or damaging the other party. The agreement makes a distinction between direct action against the other party and direct action against a third party, the latter being defined as actions which during a dispute are directed against anyone who is not a party to the dispute, for the purpose of exerting pressure on the other party to the dispute.[13] In the first place a number of actions is enumerated which must not be taken even against the other party to the dispute. Some of them are, at least in certain circumstances, prohibited by the general law. I shall quote only one of the articles in this part of the chapter: 'After a labour dispute has been settled, no retaliatory action must be taken either against anyone who has been a party to the dispute or against anyone else because of his connection with the dispute'. The provision is general; it prohibits victimisation also within the parties to the agreement, *e.g.*, against blacklegs or employers who have broken the rules of solidarity.

The agreement sets out that wherever action must not be taken against the other party by virtue of the agreement or any other collective contract or by law, action against a third party is also prohibited. This provision eliminates an indirect way of striking at the other party in cases of this kind.

[13] This is, of course, the type of situation that came before the Courts in this country in cases like *Lyons* v. *Wilkins* (1896), 1 Ch. 811, and *Quinn* v. *Leathem* (1901), A.C. 495. The approach to the problem, however, is somewhat different. In the Basic Agreement the attention is drawn to the position of the third party, *i.e.*, in the above cases Schoenthal and Munce.

By these provisions a third party is thus given the same protection as a party involved in the dispute. The main object of this part of the agreement, however, is to give further protection to a third party, provided he remains *neutral* in the dispute.

The agreement defines very elaborately who is to be regarded as an *unneutral* third party. It would be unneutral conduct, *e.g.*, to perform work 'blockaded' because of the dispute, to employ workers 'blockaded' by the employer because of the dispute, or financially to support one of the parties to the dispute so as to strengthen his fighting power. It is not, however, to be considered a violation of neutrality to perform so-called protective work, *e.g.*, such work as is necessary in order to prevent danger to people, or damage to plant or certain stocks of commodities, nor is it to be regarded as a breach of the rules of solidarity for members of fighting organisations to carry out such work. Contractors and customers are not comprised among unneutral third parties.

The agreement thus prescribes that hostile actions, even if permissible against the other party, must not be directed against a *neutral* third party—

(*a*) In disputes pertaining to the entering into collective contracts;

(*b*) In disputes pertaining to the entering into, or application of, individual contracts of employment;

(*c*) In competitive disputes regarding prospective jobs, *i.e.*, demarcational disputes;

(*d*) In order to induce the other party to join, or to prevent him from withdrawing from, a trade union or employers' association.

In inter-union disputes, demarcational and organisational, and in disputes between organised and unorganised workers, the employer is regarded as such third party. This may give rise to very intricate questions in negotiations on closed shop agreements.

There is, however, an important exception to the rules as to the protection of a neutral third party. Notwithstanding these rules, it is permissible, in disputes connected with the making of a collective contract (see above under (*a*)), to resort to stoppage of work and some other incidental measures in order to assist a party to the original dispute by extending the scope of the original dispute. There must consequently be a primary open conflict. It is, as appears, a prevailing principle in Swedish industrial relations that the parties in the labour

market shall have a free hand, and liberty to take sympathetic action, in the all-important disputes over the terms of new collective contracts, whereas the usage of direct action as a means in other disputes is more or less restricted or totally discarded.

The administration of this chapter is left to the Labour Market Board as a body of arbitration. Its decisions are final and legally binding. If no agreement can be reached by the majority, an impartial chairman, appointed jointly by the SAF and the LO, must be summoned to participate in the deliberation and decision on the matter. In this field the Labour Court has thus been replaced by a joint voluntary body.

(5) Finally, the Basic Agreement contains regulations as to the handling of conflicts involving functions essential to the community. The employers in the industries and trades concerned are, as a whole, not organised within the SAF. Most of them are public authorities. It would therefore have partly frustrated the objects of the agreement if the application of this part had been confined to trades bound by it. On the other hand, the powers of the Labour Market Board in dealing with these conflicts are much narrower than under the foregoing chapter. If either of the two top organisations or a public authority or any other similar body invokes the jurisdiction of the Board on the ground that a public interest is in jeopardy owing to a conflict, the Board must promptly take the matter into consideration. It cannot, of course, make any binding decision, but if a majority has been won in favour of a certain solution of the conflict it is the duty of the SAF and the LO, each on its side, immediately to take measures for bringing about a settlement between the parties concerned.

To sum up, the peculiar characteristics of the Basic Agreement are mostly due to the fact that its object is to render superfluous legislation on the matters regulated by it. It is the outcome of a common feeling on both sides that their interrelations are best managed without State interference, and in this respect it involves an important element of self-government. True, it prescribes for the most part only negotiations resulting in non-binding decisions and provides for machinery to that end, but it also lays down rules of conduct to be observed not only between the parties but in relation to outsiders as well. The Basic Agreement is thus in fact very similar to a piece of legislation. It represents a model of legislation by consent. But as it is still a contract it lays down obligations only between the parties. That, of course,

is its main weakness. The importance and strength of the parties warrants the enforcement of its provisions, but a third party can raise no claim under the agreement, although he has been injured by hostile action in breach of it. He cannot get redress for himself, and as the interests of the organisations bound by the agreement may not always be contrary to each other he cannot be sure that measures will be taken to put an end to such action.

A. Adlercreutz.

PACTA SUNT SERVANDA

I

Dean Pound, whose teaching owes much to Kohler's legal philosophy, once wrote:

> 'Everyone has begun to say that law is relative. But relative to what? Kohler answers that it is relative to civilisation, and laws are relative to the civilisation of the time and place. There is no universal body of legal institutions and legal rules for all civilisations. Instead there is one universal idea, namely, human civilisation.'[1]

'Civilisation' is here the translation of Kohler's term 'Kultur', a term of some ambiguity in the original German, which Kohler once defined as

> 'the sum of achievements which Man has attained' (sc. at a given time) 'with regard to mastering the universe through the means of Knowledge, Art, and Domination of Matter.'[2]

In the same context Kohler emphasises that

> 'Law, like Custom, is not dead, but a living being.'[3]

No one has so far succeeded in defining life; certainly one of the qualities of a living being is that it continuously changes, or, as Goethe has it, dies and is reborn.[4]

If this be true, nothing can be stated about law in general but that it is

> 'a rule of conduct binding on members of a commonwealth as such'.[5]

'Binding' ought not to be understood as 'enforced'.

> 'We may better realise the fundamental character of law by trying to conceive its negation or opposite. This will be found, it is submitted, in the absence of order rather than in the absence of compulsion'.[6]

It is therefore just as inadmissible to reserve the term of 'law'

[1] *Interpretations of Legal History* (Cambridge, 1923), p. 143.
[2] J. Kohler, *Einführung in die Rechtswissenschaft*, 6th ed., edd. Oertmann & Honig, Leipzig, 1929, p. 5. (My translation.)
[3] *Loc. cit.*, p. 4. (My translation.)
[4] 'Und wofern du dies nicht hast/Dieses Stirb und Werde/Bist du nur ein trüber Gast/Auf der dunklen Erde.' (West-Oestlicher Divan.)
[5] Sir F. Pollock, *First Book of Jurisprudence*, 6th ed. (London, 1929), p. 29.
[6] Pollock, *loc. cit.*, p. 33.

for rules which hold a mean between anarchy and despotism [7] as to state any rules whatsoever which any law necessarily keeps,[8] or to state:

> 'The immediate objects of Law are the creation and protection of legal rights',[9]

or to define:

> 'Law is a mode of regulating conduct by means of sanctions imposed by politically organised society'.[10]

(Are we really to refuse the name of law to the order binding upon the citizens of a Christian Utopia only because its rules are not imposed and obeyed as duties but willed by every member of society since he loves his neighbour as himself?) On the other hand, it certainly is just as fallacious to deny that the law existing in the present civilisation generally consists of a system of rights and corresponding duties. Professor Duguit, who denies the existence of rights, and Professor Lundstedt, who denies the existence of both rights and duties, have been honoured by a conclusive refutation in one of the classic essays of our time.[11]

Indeed, most jurists would probably agree with a description of English law as a system of distribution of rights and duties, with the proviso that certain auxiliary rules do not directly impose duties, but only assist the execution of the primary rules doing so. The lawyer, then, could be said to be interested only in rules creating legal rights and duties.

I propose to challenge this statement and to show that there is at least one rule which is conceived as binding throughout the English 'Commonwealth', although it is not binding as a legal duty, and not even imposed as a moral duty, so that neither a legal nor a moral right for its being obeyed exists. This is the rule Pacta sunt servanda.

II

In the present stage of civilisation it is an unwritten condition of the law of free peoples that the law does not enslave. It would therefore be unthinkable that the law deprive a citizen

[7] Bodenheimer, *Jurisprudence* (New York, 1940), p. 14 and *passim*.
[8] Cp. Dr. Friedmann's interesting remarks to Stammler's and Kelsen's theories and the reality in the Nazi State, pp. 94, 110, of his *Legal Theory* (London, 1944).
[9] Holland, *Elements of Jurisprudence*, 13th ed. (Oxford, 1924), p. 81.
[10] W. Searle, *The Quest for Law* (New York, 1941), p. 6.
[11] C. K. Allen, *Legal Duties*, pp. 156 *et seq.*, in the volume of that title (Oxford, 1931).

of his personal liberty in order to prevent him from *voluntarily* obeying its rules by directing his volition according to them; only after he has disobeyed them it may be appropriate to deprive him of his personal liberty, for instance, in order to force him to give redress, or to punish him.

If we read this clausula into Professor Allen's definition of a legal right:

> 'the legally guaranteed power to realise an interest',[12]

(with which I respectfully agree) we shall find that a fundamental difference arises according to the subject-matter of the interest.

If I have any interest, it is that a certain act is done or that a certain act is not done.

If my interest is that an act shall not be done (*e.g.*, that no one touch or take away a chattel in my power), this interest needs no realisation, but is perfectly satisfied until someone commits a certain act (*e.g.*, touches or takes away 'my' chattel). As soon as such act has been done, my interest is no longer realised. If I now approach the law, the law is logically unable to undo the act done; moreover, if it could undo the act there would not have been an infringement of my interest, which infringement consisted in the performance of that very act. Consequently the only way for the law to 'realise' my interest is to compel the doer of that act to do another act which reintroduces a situation similar to, but not identical with, the situation before the infringing act, or to compensate me in money. Of course, no one could do any infringing act if every person capable of doing it were imprisoned from the start by order of the law, but such a method would go beyond the limits which our law has to respect. An injunction, threatening imprisonment, does not prevent infringement, but only increases the risk for the doer.

Aliter, where my interest is in some act being done; such interest is, but for very few exceptions, only recognised by the law where it arises from a contractual promise. From the moment where the act was due to the moment when it is performed, my interest is unrealised. It logically can only be realised by the act being done. True, where 'time is of the essence of the contract', I might be entitled to say that the stipulated act can never now be done (the other party would be estopped from alleging this); but in every other case I may

[12] *Loc. cit.*, p. 183.

be prepared to accept compensation instead of performance, or I may even be entitled by law to request it for reasons of my own—the fact remains that my original interest can only be realised, *i.e.*, made to come to pass, if the other person performs the act in the performance of which I have an interest. If, then, I am to have a legal right to that act being performed, I must have the power to set the machinery of the law in motion in order that this act be performed—provided that the law can do so without transgressing the limits described above. It will be seen that it is perfectly able to do so.

Suppose that (a) in an English contract, (b) in a German contract (conforming to every rule as to form and essential validity), the seller S has promised the buyer B to deliver x tons of corn on January 1, 1946, and that he did not deliver.

The English buyer has no other claim than to receive damages for non-delivery, *i.e.*, the amount of money which is equivalent to the damage flowing directly and naturally in the ordinary course of events from the non-delivery. Since the goods have a market price, this is ordinarily the difference between the contract price and the market price, provided the latter is higher.[13] If it is not higher, he ordinarily only gets nominal damages, *i.e.*, nothing. Specific performance is expressly excluded[14] (even if it were not, B would not have the *power* to realise his interest, since this remedy is essentially discretionary).[15]

Very different in German law. B's primary right is for specific performance. After he has obtained judgment against S ordering him to deliver x tons of corn to B, B can charge the bailiff with searching S's premises for corn and handing over to B any amount of it up to the required quantity. It makes no difference whether the judgment is for delivery of a specific thing or for delivery of a certain quantity of unspecified goods.[16] If B can make it appear probable that S can be expected to evade his duty to deliver, he need not even wait until delivery is due, but can at any time obtain a judgment for delivery on January 1, 1946.[17] If the bailiff does not find at once the desired quantity, B may at any time execute from the judgment within thirty years.[18] He may instead *elect* to

[13] S. 51 (2), (3), Sale of Goods Act, 1893.
[14] S. 52, Sale of Goods Act, 1893.
[15] *Whiteley* v. *Hilt*, [1918] 2 K.B. 808; *Cohen* v. *Roche*, [1927] 1 K.B. 169.
[16] Ss. 883, 884, Civil Procedure Act, 1877 (1924).
[17] S. 259, Civil Procedure Act, 1877 (1924).
[18] S. 218, Civil Code.

set S a reasonable term for delivery, announcing at the same time that he will refuse acceptance after expiration of the term. If S allows that term to lapse, B's right for delivery is changed into a right for damages in money; he may sue for them at the Court of first instance of his original action.[19] The amount of the damages is limited to about the same amount as in English law (although the wording of the German rule of Adequacy of Causation is slightly different from that of the English rule of Remoteness of Consequence). Moreover, since this is a ' reciprocal ' contract, B need not sue for specific performance at all if he does not desire specific performance; he may instead set a reasonable term for delivery in the same manner and with the same announcement as mentioned above; if this term expires, B loses his right for performance and can elect between cancelling the contract *ab initio* or taking damages for non-delivery.[20]

It seems to the writer self-evident that only in the German case the law grants B a power to realise his interest, *viz.*, to have the promise performed; what it can do without violating the right of personal liberty, it does; moreover, it allows B, in addition to his primary right, on his election, a genuine secondary remedial right. Of course, the law cannot guarantee the success of its endeavours to realise the original interest, as little as it can guarantee that a debtor will be able to pay damages. The English law only grants a right for compensation in money (which nevertheless usually receives the name of a ' secondary ', ' remedial ' right) and refuses a *right* for specific performance.

But both Sir F. Pollock and the American Restatement define a contract as ' a promise or set of promises which the law will enforce '.[21]

It was mainly Mr. Justice Holmes who pointed to the cleavage between theory and facts. His theory of contract as the assumption of a risk (on which I do not venture an opinion) starts from the statement that the sole consequence of a contractual promise is liability for damages,[22] and he rather aphoristically says in the frequently misunderstood lecture ' The Path of the Law ':

> ' If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable

[19] S. 283, Civil Code; s. 893 (2), Civil Procedure Act.
[20] Ss. 325, 326, Civil Code.
[21] Pollock, *Principles of Contract*, 11th ed., ed. Winfield, p. 1.
[22] *The Common Law* (Boston, 1881), p. 301.

to pay a compensatory sum, unless the promised event comes to pass '.[23]

But the clarity of his proposition was much prejudiced by the fact that he, as far as I can make out, never publicly condescended to explain that he had been misunderstood if he was taken to mean that the promisor promised nothing but to pay damages. It is this assumption which is the basis of every opposing opinion.[24] In fact Holmes did not deny that the promisor unconditionally promises to perform, and nothing else. In his letter to Sir F. Pollock of December 11, 1928,[25] he writes:

> ' With regard to contracts, I will bore you no more except to say that your suggestion that I ought to criticise the declaration in assumpsit for not denying tender of damages, shows the persistence of the impression that I say that a man *promises* either X or to pay damages. I do not think that a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass '.

From this letter, taken in connection with certain earlier ones (which space forbids to quote), it becomes quite clear that Holmes did not want to say that damages were of the essence of the promise, but that they were made the only *consequence* of a promise. This is, it is submitted, equivalent to saying that the promise is not enforced.

Many legal writers felt the truth of this fact and sought to escape by a back door. Thus Mr. Parker recognises that such statement is implied in Gray's (and one is inclined to add, in Salmond's) definition of a legal right, but he adds that

> ' the ordinary usage of language regards any claim which has a remedy as a legal right apart from the remedy '.[26]

We are, however, not concerned with terminology, but with the question whether the English promisee has a right, granted by the law, to have the promise performed. Moreover, it seems senseless to speak of a ' claim ' without asserting

[23] Harvard Law Review. 10, p. 462.
[24] Cp. Allen, *loc. cit.*, p. 170: ' the essence of the promise is liability for damages '.
[25] Pollock-Holmes Letters, ed. de Wolfe Howe (Cambridge, 1942), II. p. 233.
[26] Salmond, *Jurisprudence*, 9th ed., ed. Parker (London, 1937), p. 156, note 101.

whether the law enforces it or of 'remedial' rights where the 'primary' one cannot be enforced and thus does not exist.

Sir F. Pollock makes the following statement which, with all respect, must be called surprising:

> 'Strictly speaking, law cannot compel the performance of positive duties. A negative duty can be directly enforced by physical constraint, or by otherwise depriving a man of the means of action. But a positive duty can be enforced only in an indirect manner, by attaching such consequences to non-performance as to make performance in most cases and for most persons the preferable course. Where the performance consists in the payment of money . . . or in the delivery of specific property which is in his possession, it may be within the power of the law to do what he ought to have done'.[27]

This theory, compared with the facts from German law, given above, shows that even the most eminent jurists are in constant danger from their subconscious conviction that their own positive law is the only possible, the 'natural' law. Perhaps I ought to add that in German law any contractual promise, if actionable at all, may lead to a judgment for specific performance; and the Civil Procedure Act contains most elaborate provisions for the direct enforcement of any such judgment of which kind the act in question may be; it is only one judgment which though perfectly admissible in itself cannot be directly enforced, and this, for social reasons: an order to an employee to perform a contract of service.[28]

The fundamental error is, it is submitted, to overlook a *direction* which the law provides, *e.g.*, by restricting its own activities. If a right is, as it were, promoted to, or introduced as, a legal right where the holder of the presumptive right is to have the power to realise his interest through the intervention of the law, it is the correlative duty which the law actually imposes which decides upon the compass of the right. Thus, where the law has the choice between direct enforcement (specific performance) or indirect enforcement (compensation and/or punishment) of a rule and restricts itself unnecessarily to granting a right for compensation, it thereby directs that no right exists correlative to a duty to perform. If then the law only admits compensation in redress for breach of contract instead of granting specific performance as of right, it

[27] *First Book of Jurisprudence*, p. 59.
[28] Ss. 883–898, Civil Procedure Act.

thereby decrees that (in contrast to other systems where specific performance is granted) no right shall exist in its area to have a contractual promise performed.

In other words, the law in this area frowns at the breach of contracts but makes no use of its power to prevent the individual contract being broken. Under such circumstances it would seem an abuse of language to state that the promisee has a legal right against the promisor that the latter perform the contract. This is what Mr. Justice Holmes wanted to state, it is submitted.

III

But now we have to face the fact that no one ever suggested that the English seller was less in the habit of living up to his promise than the German seller; on the contrary, it is the English seller whose word is proverbially good.

Obviously the German buyer is in a much better position than the English one as far as his legal rights are concerned. His right to receive damages is a very feeble safeguard for the English buyer against a seller who breaks his promise. Delivery or non-delivery may decide the value of a business, secure the means to undertake a new adventure, empower either party to realise a secret plan; every sale is part of a commercial adventure of either party, but in Germany and many other countries it is not for the seller to decide what is better for him, to pay damages or to deliver. Besides, in both countries the law purposely restricts the limit of damage which may be compensated so that only part of the damage really caused by non-delivery has to be compensated.

Moreover, where the market is steady (the English seller ordinarily does not even run a risk beyond nominal damages if he decides not to deliver), how does an English buyer receive the goods which he needs in the extreme case where he, after the seller S did not deliver, buys for the same price from X, a man with a warehouse full of corn who also does not deliver, then from Y, Z, and so on?

One answer presenting itself would seem to be that Austin's positive morality enforces a moral right with the correlative moral duty to perform one's contractual promises.

But this thesis does not conform to the facts. In the first place, Professor Allen's onslaught upon the traditional division of rights and duties into moral and legal ones, existing in

intersecting circles, has exploded this conception, held for so many years.[29]

> ' A moral duty can only be enforced by individual conscience ',

and in connection with the performance or non-performance of every individual promise there are so many different facts to be taken into account that no one is entitled to state that a moral rule ' Pacta sunt servanda ' ought necessarily to overrule every opposing deliberation of the seller's conscience. But above all, there is even a positive proof, as it were, that no such moral duty exists in the area of English law.

No society consists only of good men who listen to their conscience, and it is just one of the tasks of positive law to make the bad men conform to rules which in any case are obeyed by the good members of society. Mr. Justice Holmes even affected to state in his lecture ' The Path of the Law ' that this was the sole subject of the law.[30] Professor Allen means something similar when he says:

> ' . . . that law tends to reinforce by commands and penalties the more elementary duties of respect for the property, lives, liberty and general well-being of others. This is not for the schooling of the majority of citizens, who already observe these moral duties; rather it voices, and more clearly formulates, the sentiment of the majority with the object of protecting it against the ubiquitous minority which is indifferent or hostile to such elementary dictates of ethics '.[31]

If, then, in the area of English law a moral duty existed to perform a contractual promise, this duty would be carried out by all good men and laughed at by all bad men. Would it then be conceivable that the law not only remained in the state where such performance cannot be enforced, as we saw above, but that even the Sale of Goods Act, 1893, an admittedly declaratory act, was allowed not only to retain but to restate in statutory form the old rule of law which then would be in direct contradiction to existing morals? Since this appears unthinkable, there is only one conclusion admissible: In the area of English law there exists neither a legal nor a moral duty to carry out a contractual promise, though there may be a duty to compensate the promisee for

[29] *Legal Duties*, *loc. cit.*, p. 196 *et seq.*
[30] Harvard Law Review, 10, 457 ff.
[31] *Loc. cit.*, p. 200.

damage; this subject to the discretion of a Judge in certain narrowly circumscribed cases.

The explanation why nevertheless the great majority of contracts are carried out will be found elsewhere.

Sir F. Pollock, in his correspondence with Mr. Justice Holmes, constantly opposed to Holmes' contract theory (as he understood it) that the promisee ' has a reasonable expectation ' of the contract being performed.[32]

Austin also speaks of the expectations held by the promisee when he says:

> ' The conventions enforced by positive law or morality are enforced legally or morally for various reasons. But of the various reasons for enforcing any convention the following is always one. Sanctions apart, a convention *naturally* raises in the mind of the promisee (or convention *tends* to raise in the mind of the promisee) an *expectation* that its object will be accomplished, and to the expectation naturally raised by the convention, he as naturally shapes his conduct. Now, as everything of the business of human life turns or moves upon conventions, frequent disappointments of these expectations which conventions naturally excite, would render human society a scene of baffled hopes and of thwarted projects and labours. To prevent disappointments of such expectations is therefore a main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts and agreements '.[33]

A little less cumbersomely expressed, this means: A promise has the praelegal effect that the promisee *hopes* it will be kept —why should he otherwise listen to it?—and it is the business of morality and law to change this hope not only into an expectation but into a *reasonable* expectation.

Almost a hundred years later Professor Lundstedt, of Upsala, said just the same, believing, however, to proclaim a new truth in contradiction to orthodox jurisprudence, when he wrote:

> ' The reliance of the promisee on the promise is so far from being the basis of the legally binding effect of the promise that this effect on the contrary arises in order that people may place such reliance on the promise that

[32] Pollock-Holmes Letters, *passim*, *e.g.*, II, pp. 201 and 233.
[33] *Province of Jurisprudence Determined*, 2nd ed. (London, 1861), p. 299.

agreements and other judicial acts may be useful instruments for maintaining and increasing the social welfare '.[34]

Both Austin and Lundstedt argue that it is the social welfare of the community which requires a rule that promises ought to be kept.

Now it is the well-known argument of Professor Duguit that this social necessity, which he calls social solidarity, is already at the bottom of every valid legal rule, so that any rule conforming to such necessity is law in itself without being proclaimed as such. Rightly understood, he does not mean that men consciously shape their rules according to that necessity, rather that a subconscious urge makes them do so.[35]

> ' It is, of course, true that when there is no written statement, or at least no formulated custom, there does not exist for that rule of law a definite legal sanction. But that does not involve the absence of obligation in that rule of law understood not as a command but as a way of life derived from the necessity of social existence. Nor must we confuse the compelling force of this rule with the sanction which society organises to ensure its acceptance. The way in which society organises the sanction is the subject of another kind of law which for want of a better term may be called constructive '.[36]

This theory deserves all the criticism directed against it as long as it aspires to describe the whole essence of the present law. In that respect all the strictures made by Professor Allen are a conclusive refutation of that theory.[37]

But who are we to exclude the possibility that with the growth of civilisation a binding order of law will develop in the subconscious minds of men which conforms to an all-embracing principle of social solidarity?

And I venture to submit that the rudiments of such a rule, conceived in such a manner, can be found in the phenomenon confronting us at this moment.

In the present stage of our civilisation statecraft and private business, peace, nationhood, family, exchange of material and immaterial goods, all these, the very essence of our social being, largely depend on promises of which we expect fulfilment. The latter expectation is sunk so deeply into the mind

[34] V. Lundstedt, *Superstition or Reality in Action for Peace . . A Criticism of Jurisprudence* (London, 1925), p. 100.
[35] See Mr. Parker, in Salmond's *Jurisprudence*, note 27, p. 46.
[36] L. Duguit, *Law in the Modern State*, transl. F. & H. Laski (London, 1921), p. 74.
[37] *Legal Duties*, pp. 158 *et seq.*

of the ' Man on the Clapham Omnibus ' that it would ordinarily not occur to him to break his promise. He has it ' in his bones ', as the saying goes, that promises are made in order to be kept. This is his ' way of life ' (Duguit !), and neither a moral nor a legal duty need be imposed upon his conscious mind to induce him to do so. He knows (subconsciously) that keeping his promises is one of the conditions holding the community together.

Now it is, of course, impossible to rely upon such subconscious consensus, except in a very high stage of civilisation. Civilisation had a long way to go from Homo Homini Lupus est —to the stage described here. True, where we are now, mankind has still very little reason for complacency, as the recent past and the present abundantly show.

Nevertheless, it is a sign of a certain amount of maturity if in one community the spirit of social solidarity has penetrated so deeply into the subconscious mind that certain rules are on the whole followed which in other communities have to be enforced by morality or positive law.

But if this is the explanation for the curious fact that English positive law does not enforce the performance of a contract, at least in the sense that it does not furnish the promisee with a right that the promise be kept, it should still be recognised that the rule Pacta sunt Servanda is a part of English law if we define law as the sum of rules which the community consider binding upon themselves, instinctively or consciously.

J. H. Gebhardt.

STATUTES AND REPORTS

THE NATIONAL INSURANCE ACT, 1946

THE National Insurance Act, 1946, forms part of a series of statutes which includes the Ministry of National Insurance Act, 1945, the Disabled Persons Act, 1945, the Family Allowances Act, 1945, the National Health Service Act, 1946, and the National Insurance (Industrial Injuries) Act, 1946. A further Bill dealing with public assistance will be introduced in the fairly near future.

This mass of legislation has radically transformed the system of social insurance and the social services which support it. It brings us substantially nearer to social security in so far as this depends on domestic social policy.

From the legal standpoint, the Industrial Injuries Act is the most interesting of these measures, on account both of the juridical problems which it raises and of its effect on the professional interests of lawyers. This statute can, however, be properly understood only if it is seen against the background of workmen's compensation and the huge volume of case law which has been thrown up by that ill-conceived system. It cannot, therefore, be treated within the limits of a note of this kind.

The National Insurance Act, 1946, is of much greater importance than the Industrial Injuries Act or any of the other statutes mentioned above (with the possible exception of the National Health Service Act) as regards the extent of its application and the scope of its provisions. It will affect almost the whole nation.

The new scheme of National Insurance is comprehensive and unified. It covers the entire population above school age. It provides comprehensive benefits. It is unified as regards administration and finance, subject to certain exceptions. Thus, the Industrial Injuries scheme has a separate fund, separate tribunals and a separate advisory committee. Service pensions will continue to be dealt with by the Ministry of Pensions. And an assistance service is still retained and will probably be administered by the Assistance Board, with certain services in kind remaining with local authorities.

The National Insurance Act requires everyone who, after

the appointed day, is in Great Britain and fulfils the prescribed conditions as to residence, and who is over school-leaving age and under pensionable age, to become insured and to remain insured for the rest of his life. The Act contemplates that arrangements will be made with the Government of Northern Ireland for a unified system with that country.

There are three classes of insured persons: (1) employed persons, *i.e.*, those working under a contract of service; (2) self-employed persons, *i.e.*, those who are gainfully occupied otherwise than as employees; (3) non-employed persons, *i.e.*, those who do not come within either of the above categories. There are different rates of contribution for insured persons according to the class to which they belong. Great mobility between the three classes is assured by the rules which define the classification. Thus, a person is deemed to be an employed person for any week during any part of which he is employed, so that a single day's employment will determine his classification for that week, no matter what he may do on other days. He is deemed to be a self-employed person for any other week during any part of which he is self-employed. Employment is thereby given priority over other forms of gainful work. A person is deemed to be non-employed for any week in which he has not been either employed or self-employed.

Right to each of the benefits requires a specified number of 'contributions of the appropriate class'. Unemployment benefit requires contributions as an employed person, while sickness benefit and maternity allowance require contributions as an employed or self-employed person. Contributions of any class suffice for the other benefits. In some instances the Act refers to 'contributions of the appropriate class or their equivalent', and where this occurs the Minister may prescribe by regulations that a specified proportion of contributions of one class shall be accepted in lieu of contributions of another class. The Minister is also authorised to make regulations to relieve from the obligation to contribute, persons who are unemployed or incapable of work; unpaid apprentices and students receiving full-time education; and persons not in receipt of an income exceeding £104 a year who apply to be excepted. Contributions will be credited to these excepted individuals, but only for the purpose of entitling them to unemployment or sickness benefit after they have ceased to be excepted. These provisions are of great importance in regard to housewives.

The contribution rates are specified in the First Schedule. They distinguish between men and women, and between adults and young persons under eighteen. The Exchequer supplement is also laid down in the Act for each contribution, according to the class, age and sex of the person concerned. A most important provision is contained in section 3, which permits the rates of contribution to be varied with a view to maintaining a stable level of employment. A variation order must not, however, disturb the relation between the respective contributions of an employee and his employer, nor the proportion which the Exchequer supplement bears to the contribution in respect of which it is made.

A common fund is established called the National Insurance Fund. Hitherto, each scheme has had its own fund. All these funds will be wound up and their assets transferred to a new reserve fund, from which payments may be made only by a resolution of the House of Commons.

There are seven groups of benefits: unemployment benefit, sickness benefit, maternity benefit, widow's benefit, guardian's allowance, retirement pension and death grant.

The amounts of the various benefits are laid down in the Second Schedule. The standard rate for sickness and unemployment benefit for a man or a single woman is 26s. a week. Young persons receive lower rates unless they are entitled to claim for a child or adult dependant, in which event they receive the full adult rate. A married woman only receives the full rate if she is supporting an invalid husband or is not living with him and is unable to obtain financial aid from him. In any other circumstances married women receive lower rates of benefit: the Schedule is complicated by a distinction drawn between married women over eighteen years of age and those below that age. All the rates of benefit are subject to a weekly increase of 7s. 6d. for the first or only child, or 16s. for one adult dependant. The subsequent children do not rank for benefit because family allowances are payable in respect of them.

Only employed persons can qualify for unemployment benefit, and the conditions and disqualifications contained in the Unemployment Insurance scheme are continued with only slight changes relating to the waiting period and the record of contributions. Both employed and self-employed persons can qualify for sickness benefit. The only legal link with the National Health Service is the authority given to the Minister

of National Insurance to make payments from the National Insurance Fund to the Exchequer on a per capita basis in accordance with a prescribed scale towards the cost of the Health Service. This is a somewhat childish piece of window-dressing, in view of the fact that the Exchequer supplement which is paid to the National Insurance Fund is larger than the payment back to the Exchequer for the Health Service.

Maternity benefit is of three kinds. There is a grant of £4 for each baby (in the original Bill it was only for each confinement, so that a mother giving birth to quadruplets would have received no more than for one child). A woman is entitled to this grant by virtue of either her own or her husband's insurance. If she normally follows a gainful occupation, she receives, in addition, a maternity allowance of 36s. a week for thirteen weeks, beginning about six weeks before the date when her confinement is expected, on condition that she abstains from gainful work. If the confinement occurs later than was expected, the allowance continues until six weeks after the event.

Women who do not normally engage in gainful work receive an attendance allowance of 20s. a week for four weeks. This is not payable to a woman who is entitled to a maternity allowance. Here, too, the attendance allowance is forfeited if the mother does any work as an employed or self-employed person, ' or fails without good cause to observe any prescribed rules of behaviour '. Under the National Health Insurance scheme, a woman who was herself insured and married to an insured husband could draw a double maternity benefit, but this duplication of benefit is precluded under the new Act.

Widow's benefit, like maternity benefit, is complex in character and is based on new principles. Hitherto, the mere fact of widowhood entitled a woman to a widow's pension, provided the insurance conditions were satisfied by her deceased husband. Henceforth this will not be so, except as regards the widow's temporary allowance of 36s. a week which is payable for the first thirteen weeks of widowhood. Thereafter, benefit will be available only to widows with dependent children; to those over forty years of age who have brought up families during widowhood; to those over fifty years old who had no young children to bring up during widowhood; and to those who are infirm and therefore unable to work. The principle that a woman cannot become entitled to a widow's pension by virtue of her own insurance is retained.

The widowed mother with one or more children of school age receives a widowed mother's allowance of 33s. 6d. a week. If she is over forty years old when her youngest or only child passes the school-leaving age, and ten years have elapsed since marriage, she is then entitled to a widows' pension of 26s. a week. A widow who has no children of school age when her husband dies and is over fifty years of age at that time, and ten years have elapsed since marriage, will receive a pension of 26s. a week immediately after her widow's allowance. Where a widow is receiving a widowed mother's allowance or a widow's pension, and earns more than 30s. a week, her allowance or pension is subject to reduction by 1s. a week for every 1s. in excess of that amount.

All forms of widow's benefit cease on death or remarriage of the woman or in the event of her cohabitation with a man. The transitional arrangements are very favourable to women drawing widow's pension under the old scheme.

The orphan's pension of 7s. 6d. hitherto payable is replaced by a guardian's allowance. This is a sum of 12s. a week, payable to a person in respect of any orphan child who is for the time being a child of his family. One of the deceased parents must have been insured. A parent for this purpose includes a step-parent. The requirements may be modified by regulations in regard to adopted or illegitimate children and the children of divorced parents.

Old age pensions are radically transformed by the new scheme. The Beveridge Report proposed four novel features. First, that everyone should be entitled to pensions in old age instead of only persons formerly employed or falling in the lower income groups. Second, that such pensions should be adequate for subsistence without a means test. Third, that the pensions should be conditional on retirement from work. Fourth, that people should be encouraged to continue at work after reaching pension age by increasing the rate of payment if retirement were postponed. All these recommendations have been adopted.

There will, therefore, be retirement pensions for old persons, not old age pensions as such. A pension of 26s. a week will be paid to an insured person who has reached pension age if he or she has retired from regular employment and has satisfied the insurance conditions. The pension age is sixty-five for a man and sixty for a woman.

In order to 'retire', a person need never have worked at all. Retirement means no more than abstention from regular

work. (Gainful work, if only inconsiderable or occasional or otherwise not inconsistent with retirement, will be excepted). For some extraordinary reason, this condition requiring retirement ceases to apply after a man reaches the age of seventy and a woman attains the age of sixty-five. He or she is then entitled to a retirement pension even though remaining in, or returning to, full work. If, however, a man between sixty-five and seventy years of age, or a woman sixty to sixty-five years old, who is receiving a retirement pension, does any work and earns more than 20s. a week, the pension will be reduced by 1s. a week for every 1s. earned in excess of the 20s. Where the insured person postpones retirement beyond pensionable age, the amount of the pension is increased by 1s. a week for every twenty-five contributions paid in the five years after pension age is reached. Retirement pensions are payable for life.

A woman, whether married or single, can, of course, qualify for a retirement pension by virtue of her own insurance. Where she does so, she will receive the full rate of 26s. a week and need not wait for her husband to retire before becoming entitled to her own pension. A married woman can also become entitled to a retirement pension through her husband's insurance if both he and she satisfy the statutory conditions. Where title is derived from the husband's insurance, and he is alive, the woman's pension is 16s. a week. A widow who is drawing one of the various forms of widow's benefit immediately prior to reaching sixty years of age can qualify for a retirement pension by virtue of her late husband's insurance, though if she remarries she will lose it. All retirement pensions are subject to increase for a child or adult dependant.

These provisions relating to pensions for old persons are more generous than the proposals contained in the White Paper issued by the Coalition Government. The pension rate is raised from 20s. to 26s. a week, and from 35s. to 42s. for a married couple. The weekly increase for each year during which retirement is postponed is raised from 1s. to 2s. And the retirement condition ceases to apply after five years has elapsed from the time of reaching pension age. The transitional conditions are much more favourable than those recommended in the Beveridge Report. Thus, the transition period is cut out entirely for retired persons who are at present receiving pensions under the Contributory Old Age Pension scheme. This large group qualifies for the higher rates at once. Persons insured under the present scheme will qualify for the new

retirement pensions, but the contribution conditions are modified. Men over fifty-five years old and women over fifty at the start of the new scheme who are not then insured must contribute for only ten years before qualifying. In consequence, whereas the Beveridge Report contemplated that contributory old age pensions would gradually rise to the full rate during a transition period of about twenty years, the present Act brings a substantial proportion of those pensions up to the new scale forthwith and reduces the transition period for the remainder to ten years at the most.

The boldest feature of the new scheme is the death grant, because this challenges the orgy of industrial assurance in which the British people have hitherto indulged in order to enable them to meet the cost of a funeral and thus avoid the hated pauper's burial. The importance of this class of business is shown by the fact that in 1938 there were no less than a hundred million policies of this kind in existence in Great Britain, representing a premium income of £72 millions a year: an average of 2s. 9d. a week from each of the ten million families contributing to this enormous total.

The death grant varies according to the age of the deceased person. It ranges from £20 for an adult to £4 for a child under 3 years of age. Either the deceased person must have fulfilled the relevant contributive conditions or have been at death the husband, wife, widower, widow or child of the family of a person who did so. In order to receive the grant a beneficiary must show that he has reasonably incurred or intends to incur funeral expenses in connection with the death. The grant is not payable to a body corporate or to an unincorporated association such as a Friendly Society or trade union, or to any person in respect of expenses incurred as a member or on behalf of such a body or association. This precludes payment to a company carrying on business as an undertaker but not to an individual person carrying on such a business. Where a person is buried or cremated by or under the direction of a county or county borough council, or by or under the direction of any association approved by the Minister, the cost may be defrayed out of the National Insurance Fund providing the contribution conditions are satisfied.

None of the benefits can be assigned or charged; and they do not pass to the creditors in the event of bankruptcy. A number of disqualifications are laid down, such as absence abroad, penal servitude, imprisonment or detention in legal

custody. These apply also to dependants for whom increases would otherwise be payable. Regulations may provide for suspending payment of benefit to a person who is undergoing treatment as an in-patient in a hospital.

An employee may recover summarily from his employer a sum equal to unemployment, sickness or maternity benefit which is lost by the latter's failure or neglect to pay the contributions due or to comply with the regulations concerning the payment and collection of contributions. The wife or widow of a employee who is deprived of maternity benefit for these reasons is given the same right of recovery as an employee.

The machinery of adjudication of questions and claims will consist of a series of administrative tribunals. But for some inscrutable reason the whole subject is left exceedingly vague. The Minister is authorised to make regulations providing for the determination by himself or by a person or tribunal, of any question arising under the Act, including any claim for benefit. Decisions thus made will be final.

Certain questions affecting children will be determined by referees appointed under the Family Allowance Act. The Act contemplates that questions of right to benefit shall be decided on lines similar to those which have proved so successful in connection with the unemployment insurance scheme, with military hardship cases under the National Service Acts, with applications, during the war, for exemption from fireguard duties and with appeals from directions of the National Service Officers ordering men and women to take up war work, to enrol in the Home Guard or to undertake full time Civil Defence work, etc. Section 43 (3) declares that the Regulations shall not provide for the Minister to determine questions of right to benefit but shall provide for them to be submitted to an officer of the Minister in the first instance, who may decide the matter or refer it to a local tribunal. If he takes the former course an appeal lies to a local tribunal. These bodies will presumably be constituted in the same manner as the Courts of Referees. The Umpire is replaced by a National Insurance Commissioner appointed by the Crown. He will be aided by Deputy-Commissioners. The final administrative tribunal may be either the Commissioner or a tribunal presided over by him or his deputy. Questions relating to the fulfilment of contribution conditions, entitlement to death grant, competing claims for dependant's increase of benefit, and the

classification of an insured person, will not be brought under this triad of administrative tribunals. An appeal to the High Court on questions of law from the decisions of the Minister, and the reference of such questions to the High Court, may be provided for by the regulations.

The regulations may lay down the procedure which the tribunals are to follow, and this includes power to provide for representation of one person by another 'whether having professional qualifications or not' (s. 43 (5)). It is understood that legal representation will probably be permitted.

One other important point worth noticing is the obligation on the Minister, before making regulations or laying a draft before Parliament, to submit them to the National Insurance Advisory Committee. This statutory body, which also has other duties placed on it by the Act, must consider objections to a draft regulation and report thereon to the Minister. The Minister must consider the Committee's report before making the regulation or laying the draft before Parliament, either in its original form or as amended. If the Minister does not accept the Committee's recommendations he must state to Parliament his reasons for not doing so. The National Insurance Advisory Committee follows the precedent of the Unemployment Insurance Statutory Committee but has extended functions. It is charged with advising and assisting the Minister in connection with the discharge of his duties and has also to perform certain specific tasks allotted to it under the Act.

W. A. Robson.

Final Report of the Departmental Committee on Alternative Remedies (Cmd. 6860)

This Report is of outstanding importance. It deals with the impact of the new system of comprehensive social insurance on the law of tort. The National Insurance Acts, 1946, do not constitute a novel departure in political theory and practice. Sir William Beveridge spoke of a 'British revolution . . . a natural development of the past'. The issues raised in the field of legal theory are, however, truly revolutionary, touching the fundamentals, and indeed threatening the very existence, of the law of tort. If the community assumes complete responsibility for any loss suffered by its members it becomes unnecessary to continue a system of rules which

holds the individual liable to pay compensation for injuries caused by him. The law of tort contains some indications pointing in this direction. The incidence of liability is sometimes determined by social policy rather than individual fault. The practice of insurance against liability, particularly where compulsory, shows even more clearly the substitution of social for individual liability. When the first Workmen's Compensation Act was passed in 1897, some hopes were entertained that this would lead to the disappearance of the law of tort from the field of industrial accidents. But these expectations were not only unjust as they offered limited benefits under the Act for full compensation at common law, they were also unsound in theory as they confused minimum provisions against need and compensation for loss. It is one thing for the community to protect its members against extreme poverty resulting from specified causes, it is quite another to assume the liability to compensate for injuries wrongfully inflicted. The establishment of social insurance as of other social services, therefore, does not reduce the need for the law of tort except that in some cases the extent of the loss, and thus of the wrongdoer's liability, may be reduced by the provision of social insurance and other social services.

The question whether Workmen's Compensation should replace damages in tort was evaded by the Legislature and the principle of election between compensation and damages was enacted. This compromise has worked most unsatisfactorily. It was, in any case, misleading to speak of an election where one of the alternatives offered would only be chosen if the other was not available. Nevertheless, the notion that social services could be described as an alternative, and that they might be offered as a substitute for, damages was kept alive by the Workmen's Compensation Acts and it appeared again in the Beveridge Report. Sir William Beveridge recommended that the relation of insurance claims to remedies in tort should be examined by an expert committee. His own observations were confined to general principles intended, no doubt, to define and illustrate the problem rather than anticipate the solution. Yet the very description of the problem as that of ' Alternative Remedies ' tended to prejudice the work of the committee of experts whose report, in fact, fails to explain that these remedies are not true alternatives at all. Again, Sir William Beveridge's general principle that ' an injured person should not have the same need met twice over ' postulates that both remedies are similar in character and purpose, concerned

to meet needs, different only in that the responsibility of providing for these needs has been shifted from the individual wrongdoer to the community. From these faulty premises Sir William Beveridge was logically led to speculate on the possibility of abolishing all individual liability in tort.

The Committee on Alternative Remedies considered this possibility and decided against it on the ground that insurance benefits would generally fall far short in value of the damages recoverable in tort. It became, therefore, necessary to consider how benefits and damages should be adjusted. Following Sir William Beveridge's advice against duplicating provision against the same need, the Committee recommended that the injured person should not be permitted to recover by way of damages and benefit more than the maximum recoverable from either source alone and that, therefore, when assessing damages the Court should take into account the actual amount of past and the estimated amount of future benefit.

A correct appreciation of the relation of benefit and damages would have produced a different rule. Adjustment would involve reduction only of the heads of damage affected by the provision of social insurance, such as medical expenses where these services are provided free, or setting off insurance benefits against a claim for loss of earnings. Damages for pain and suffering would, therefore, remain unaffected by benefits. This solution was rejected by the Committee on the ground that the splitting up of damages into different heads is unreal; yet in giving an outline of the present law, the Committee enumerate and explain the various heads of damage which are regularly taken into account when assessing damages. The Committee also disputed that the object of insurance benefits is merely to safeguard against financial loss and referred to the important provision by way of disablement benefit which is payable irrespective of any financial loss. But this argument would not justify the deduction of benefits, other than disablement benefits, from damages. Such deduction of all benefits was finally justified by the Committee on the ground that it would tend to discourage litigation. But this can only apply to undeserving litigation and a claim for damages for pain and suffering cannot fairly be described as undeserving, even where the injured person receives some compensation for loss of income.

The task of the Committee was not completed by consideration of the relation of the so-called alternative remedies

of insurance benefits and damages. The Committee were also asked to review the law relating to claims for damages arising out of injuries suffered by workmen in the course of their employment. The substitution of communal for individual liability for tort would necessarily require substantial reforms in the whole of the law of tort. Sir William Beveridge, however, having pointed out that in other countries the introduction of social services had led to restriction of the employers' liability, called for a review of only the law of employers' liability. The terms of reference of the Committee were thus founded upon an inconsistent conclusion derived from a faulty premise. In spite of this difficult background, still further complicated by the political implications of the problems considered, the Committee succeeded in formulating valuable recommendations for reform of the law.

The Committee rejected not only a proposal that all actions by workmen against their employers should be abolished but also another one, presented as a reasonable compromise between total abolition and the existing law, to confine the liability of employers to serious and wilful misconduct or gross negligence of the employer himself and only those of his servants engaged in superintendence. The Committee, however, recommended that absolute statutory duties, as imposed under the Factories Act, 1937, should be treated as qualified, as the duties imposed under the Coal Mines Act, 1911, so as to enable the defendant to escape liability by proving that it was not reasonably practicable for him or his servants or agents to avoid or prevent the breach of the statutory duty. This reform can be defended on the ground of abstract justice as well as on the ground that it prevents discrimination in favour of the nationalised coal industry. The Committee seems also to have thought that absolute statutory duties had impeded mechanisation of industry. It seems clear that this recommendation does not intend to put statutory negligence on the level of common law negligence since the burden of proof of negligence will not fall on the plaintiff, as at common law.

The Committee then proceeded to consider proposals of reform in favour of workmen. This, it seems, was not intended by Sir William Beveridge whose advice had determined the terms of reference of the Committee. Under this head the Committee recommended the abolition of the doctrine of common employment and, with it, the repeal of the

Employers' Liability Act, 1880. This recommendation will be generally welcomed even if it exceeds the spirit, as against the letter, of the Committee's terms of reference. This point was stressed as one of the surprisingly long list of arguments which were adduced in favour of retaining the doctrine of common employment, it was also developed at great length in the Reservations of two dissenting members of the Committee appended to the Report. These Reservations contain an observation illuminating the confused background of the Committee's work. The two dissenters point out that if the Committee were not prepared to consider social insurance as intended to replace common law remedies, which would make any extension of common law liability, as by abolishing common employment, unnecessary, then 'no reference to a Departmental Committee would have been necessary'. If a mere arithmetical adjustment of benefits and damages was required then the Courts could have been left to work out the appropriate formula without the guidance of the Legislature. Whilst this must be admitted it does not follow that the Committee were bound to accept the implications of the mistaken assumption which had led to its appointment. It is perhaps not unfitting that the abolition of the doctrine of common employment should be occasioned by a combination of logical confusion and political partisanship similar to that in which it was conceived.

In dealing with a suggestion that the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, had led to unsatisfactory results the Committee explained that this subject could not be discussed with regard to employment cases only. The same argument justifies the Committee's refusal to consider reform of other rules of general interest in the law of tort, such as *volenti non fit injuria* and the immunity of the Crown. The unsatisfactory nature of the terms of reference, however, was demonstrated most strikingly in the recommendation that a time limit of three years should be instituted for actions in tort, instead of the normal period of six years and of the time limit of one year under the Fatal Accidents Act, 1846, and under section 21 of the Limitation Act, 1939, in actions against public authorities. This recommendation was made on the assumption that it would also be applied in non-employment cases which are outside the Committee's terms of reference. On the other hand, the Committee's recommendation that notice of accident,

although no additional notice of claim, should be required in actions for breach of common law or statutory duty was expressly confined to employment cases.

In addition to the dissent expressed by two members of the Committee concerning the abolition of common employment, two other members disagreed with the recommendation concerning adjustment of benefits and damages. In their view, the claim to damages should not be affected by benefits. In explaining this opinion they were led to express disagreement with Sir William Beveridge's caution against meeting the same need twice over. 'This presupposes that the needs of a person will be met separately by . . . benefits . . . on the one hand, or by such damages . . . on the other hand. . . . Sir William submits no arguments to support what appears to be merely a personal opinion'. Similar disagreement with this principle was also expressed by another member of the Committee who disagreed with the method of adjustment proposed by the majority. 'If Sir William meant that so long as the needs are met the rights could be regarded as of secondary importance, I do not agree with him. It seems to me not less important that an injured person should secure justice and obtain his rights than that the meeting of his needs should not be duplicated'. This member advocated that either the Insurance Fund power should be given power to set off damages against benefit so as to ensure that deductions should benefit the fund and not the wrongdoer, or that adjustment should be confined to items of financial loss, on the one hand, and benefits on the other, so that no deductions would be made from the sum awarded for pain and suffering.

Legislation on the subject of this Report should be preceded by an attempt to bring order into the confusion of logical fallacies and political bias upon which the Committee's difficult task was discharged. For this purpose the reservations of the dissenting minorities will be found to be of great value. These reservations should, therefore, be considered carefully when dealing with the recommendations of the Committee.

J. Unger.

Final Report of the Committee on Procedure in Matrimonial Causes (the Denning Committee) (Cmd. 7024)

The third and final report of the committee appointed on June 26, 1946, to examine the administration of the law governing divorce and nullity of marriage in England and

Wales was presented in February, 1947. It contains recommendations for promoting the reconciliation of estranged spouses, and for improving the procedure with regard to the custody of the children of the parties to divorce cases, the financial provisions for the wife and other miscellaneous matters connected with matrimonial causes. Effect can, and no doubt will, be given to many of the suggestions by rules of court, although legislation will be necessary in some instances.

The report mentions certain external circumstances which account for the alarming increase in the number of divorce cases. These include the war, the housing shortage and 'the mere mechanics of everyday life' which have become 'so exhausting for women as to have an immeasureable effect, through sheer weariness, on married happiness'.

Stress is also laid on certain internal causes of the failure of a marriage. Among those mentioned are 'false ideas and unsound emotional attitudes developed before marriage in youth, and even in childhood', as well as sexual maladjustment, failure to have children and selfishness of temperament which make themselves felt after marriage. There is, according to the report, 'a need for a carefully graded system of education for marriage, parenthood and family living, to be available to all young people as they grow up through the enlightened co-operation of their parents, teachers and pastors'. There is also need for 'marriage guidance' to deal with the post-marital causes of unhappiness to which reference has been made.

To meet these requirements, the report recommends aid by means of State grants to the voluntary organisations which work in the field of marriage guidance, and the appointment of court welfare officers to advise parties who resort to the divorce court, or are contemplating doing so. So far as the first of these recommendations is concerned, the work done by the churches, the services legal aid centres and the Marriage Guidance Council is specially mentioned. Marriage guidance has come to be regarded as a branch of social work requiring specialised training, and because of the importance of the personal factor, the report concludes that 'the churches, voluntary societies and individuals have a greater chance of success than any State institution would have unless it was able to escape the tendency of such institutions to become impersonal'. This view is fortified, according to the report, by the lack of success of official procedure for reconciliation in

foreign countries apart, perhaps, from the rural cantons of Switzerland.

The duties of the welfare officers who can, at first, be recruited from the probation service, will be to give guidance where the parties, or one of them, wish to make use of their services, referring them, where necessary, to one of the voluntary organisations, a doctor or a clergyman, and, in certain circumstances, to furnish the court with a report. While no one will be compelled to seek their assistance, every inducement for spouses to do so, even before proceedings are begun, will be furnished. Consultation of the welfare officers will be advised by solicitors and the legal aid centres which will, no doubt, be set up under the recommendations of the Rushcliffe Report. The name and address of the appropriate welfare officer will appear on every divorce petition, and, as the court will be given power to order a report in cases where there are dependent children, or where leave to present a divorce petition within three years of the marriage is sought, it is hoped that the practice of consulting the welfare officer before proceedings are begun will grow up.

Communications made by the parties to the court welfare officer should, according to the report, be privileged from disclosure, and the public should be made to understand that the law as to collusion does not forbid discussion with a view to reconciliation. Recommendations for the amendment of the law as to condonation were outside the committee's terms of reference, but their report points out that the rule laid down in *Henderson* v. *Henderson*, [1944] A.C. 49, that, in the absence of fraud, intercourse is conclusive evidence of condonation by a husband hampers reconciliation. The rule that desertion must have lasted for three years immediately preceding the presentation of the petition in order to be a ground for divorce, has a similar tendency, because a spouse who has been deserted for the requisite period cannot resume cohabitation with the other party without running the risk of having to wait for a further period of three years in the event of the attempted reconciliation proving abortive.

In a later part of the report, it is suggested for consideration that the law of condonation should be amended by providing that the fact that the parties, in an endeavour to effect a reconciliation, have lived together as husband and wife shall not be sufficient to constitute forgiveness and reinstatement, or to terminate a period of desertion, unless and until reconciliation has been effected. This will presumably have

the effect of rendering the question whether there has been a reconciliation one of fact to be determined in the particular circumstances of each case. If the suggestion is adopted, there would be something to be said for abolishing the doctrine of the revival of a condoned matrimonial offence, as parties who have become reconciled in a real sense should be placed in the same position as that in which they started at marriage from the point of view of the divorce law.

Generally speaking, it seems that there are three ways in which the stability of marriage may be promoted. Dissolution may be wholly unrecognised by the law as was virtually the case in this country prior to 1858, or divorce, though recognised by the law, may be the subject of grave social stigma as it was in this country prior to the war of 1914–18, or else special attention must be drawn to the serious nature of the marriage vows. In an age in which divorce has become common, and has practically ceased to bear any social stigma, recourse must be had to the third method. This part of the report therefore concludes with a suggestion that the form of the marriage ceremony in register offices should be revised so as to make it plain to the parties that ' marriage is the personal union, for better or for worse, of one man with one woman, exclusive of all others on either side, as long as both shall live '.

It may be argued that this, coupled with the recommendations as to the encouragement by the State of marriage guidance and reconciliation procedure discussed above, is a very small contribution to an extremely grave social problem. The answer seems to be that the problem is not one which can be solved by the law. All that a country's divorce law can do is to endeavour to reflect public opinion, and, in the halfway house between the sacramental and contractual views of marriage in which we find ourselves at present, it is difficult to see how the above suggestions can be improved upon.

Should the contractual view ever come wholly to prevail, it may be assumed that the divorce of spouses who have no dependent children will not be regarded as a matter of public concern as it is under the present law. The public will, however, always be concerned with the problems of the custody of the children and the maintenance of the wife in divorce cases. The recommendations of the report on these matters are, therefore, socially important in spite of their procedural nature.

After pointing out that the present procedure in the divorce court, under which questions of the custody of the children are generally determined at a late stage by a judge who did not

hear the parents' divorce case, on affidavit evidence, without the guidance of any report as to the children's welfare, contrasts unfavourably with the manner in which such matters are dealt with in the Chancery Division, before magistrates and in the county court, the report makes important recommendations for reform. These include suggestions that every petition between parties with children under sixteen should contain a statement as to the past and present homes of such children, together with proposals for their education and maintenance, that such petitions should be available for inspection by the court welfare officer, who should have power to apply to the court for directions as to the future of the children whether the parents are applying for custody or not, and that the question of the custody of the children should be decided by the judge who hears the divorce case.

In some instances, there will, of course, be a conflict between the views of the parents and the court as to the welfare of the children. Although the report states that parents who have been, or are about to be, divorced have no absolute right to determine the future of their children, as they have disabled themselves from fulfilling their joint responsibility and created a new situation in which the interests of the children need consideration apart from those of the parents, opportunity will be given for the parents to be heard on questions of custody. They are to be encouraged to consult the court welfare officer with regard to their children, they will be at liberty to question him on any report which he makes to the court, and a parent to whom custody of a child is granted will be required to appoint a testamentary guardian of such child.

The recommendations of the report with regard to the maintenance of the wife are even more procedural in nature. They are designed to prevent delay, and to provide for all matters, other than alimony pending suit, to be determined by the judge who tries the divorce case, and not, as at present, by the registrar. There are, however, certain points which should be specially mentioned.

It is proposed that the magistrates should have jurisdiction to make maintenance orders in favour of the wife for a sum in excess of the present limit of £2 a week for herself and 10s. a week for each child under sixteen. It is also suggested that the divorce court should have power to entertain an application by a wife founded simply on the husband's wilful neglect to maintain her. At present the financial jurisdiction of the divorce court can only be invoked in proceedings for divorce,

nullity, judicial separation or restitution of conjugal rights. Accordingly, if a wife has been deserted for a period of less than three years, and she is unable to prove that her husband has committed adultery or treated her with cruelty, she has at present no redress (apart from the possibility of obtaining maintenance from the magistrates at the rate of £2 a week) unless she petitions for restitution of conjugal rights. These proceedings have, therefore, tended to become completely unreal, being a means of securing a financial benefit and not of insisting on the fulfilment of the obligation of married persons to live together (*Marshall* v. *Marshall* (1879), 5 P.D. 19, at p. 23).

If the recommendation under consideration is adopted, it is difficult to see what social purpose will be fulfilled by the retention of restitution procedure. Indeed, apart from the fact that the magistrates have most unfortunately come to be regarded as the poor man's court in these matters, there is no obvious reason why their jurisdiction in cases of the husband's wilful neglect to maintain should not be unlimited. It is submitted, however, that consideration should be given to the question whether non-compliance with a restitution decree should not be made a ground for divorce. At a later stage of the report it is suggested for consideration that the fact of separation for seven years or more, however it may have originated, should be so treated. If this suggestion were adopted, it would be tantamount to allowing divorce by consent on stringent conditions. Why not grant divorce to a spouse who is prepared solemnly to declare his or her willingness to render conjugal rights in cases in which the order of the court is ignored?

Non-compliance with a restitution decree is, at present, a ground for judicial separation. All that the report has to say on the subject of the latter remedy is that a wife who pursues it should be entitled to have her permanent alimony secured as she can now have her permanent maintenance secured after divorce or nullity. Although the point was strictly outside the committee's terms of reference, it is to be regretted that they did not repeat the admonitions of the divorce commission of 1912 concerning the undesirability of a remedy which produces wives without husbands and husbands without wives. In exceptional cases, it may be the only remedy which is open to a spouse who takes the sacramental view of marriage, but there is a lot to be said for leaving it to the discretion of the court to grant dissolution if it considers that the more appropriate

remedy on the particular facts (*Blanchard* v. *Blanchard* (1928), 44 T.L.R. 313).

With regard to the miscellaneous matters touched on by the report, further consideration is given to the suggestions that solicitors should have a right of audience in divorce cases, at least when they are undefended, and that the decree nisi should be abolished. As a solicitor, the writer shares the diffidence of the commentator on the Second Interim Report (*ante*, pp. 59–60) in discussing the matter. Some solicitors may have prejudiced themselves by entrusting the whole conduct of a divorce case to an unadmitted clerk who, in the nature of things, may be unable to render the same assistance to the court as a trained lawyer. Nevertheless, it is to be observed that solicitors and their clerks have a right of audience which is frequently exercised before registrars and the judge in chambers. They have thus become accustomed to dealing with questions concerning the custody of children and the maintenance of the wife, which are regarded by the report as of sufficient importance to be dealt with by a judge in open court.

The report does not recommend the abolition of the decree nisi, particularly as long as adultery and collusion continue to be bars to divorce, but it adopts the suggestion made by a commentator on the First Interim Report (*ante*, vol. 9, p. 295) that a person against whom a decree nisi has been pronounced should be able to apply to have it made absolute three weeks after the first day upon which the other party could have made a similar application.

Further suggestions for reform which are contained in the report are the abolition of the rule in *Russell* v. *Russell*, [1924] A.C. 687, the repeal of section 198 of the Judicature Act, 1925, which protects parties or witnesses in a suit instituted in consequence of adultery from having to answer questions tending to show that they have committed adultery which they have not denied on oath, and the abolition of the rule laid down by the Court of Appeal in *Hollington* v. *Hewthorn*, [1943] K.B. 587, that a finding against a person in one proceeding is not admissible in evidence against him in another proceeding unless the parties are the same.

The first and third of these suggestions are confined to matrimonial causes, while the second aims at removing an anomaly which only survives in such cases. As they all tend to lessen the cost of divorce proceedings without cheapening justice, they are not likely to have many critics. This is also

the case with regard to the final recommendation of the report concerning the jurisdiction of the court.

Firstly, it is suggested that where a wife who has been deserted by her husband was domiciled in this country immediately before the marriage or the desertion, the court shall have jurisdiction in divorce as if both parties were domiciled in this country. Secondly, it is suggested that the English court should have jurisdiction in divorce and nullity if both parties are resident in this country, provided the court of the domicile recognises as a sufficient ground for divorce or nullity that for which it is sought in this country.

So far as nullity is concerned, this would appear to be more than covered by the present law under which jurisdiction has been exercised where one party only is resident in this country (*White* v. *White*, [1937] P. 111), and without regard to the question of the recognition of the ground upon which nullity is sought by the court of the domicile (*Hutter* v. *Hutter*, [1944] P. 95). It is, however, highly desirable that this question should be dealt with by legislation in the interests of certainty, and the above suggestions would meet many cases of hardship so far as divorce is concerned.

Two of the suggestions for consideration on matters which were strictly outside the committee's terms of reference, but were nevertheless mentioned in their report, have already been discussed. Further suggestions of this nature concern the granting of leave to present a divorce petition within three years of the marriage under section 1 of the Matrimonial Causes Act, 1937, where reconciliation is impossible, independently of the present requirements as to exceptional hardship suffered by the petitioner or depravity on the part of the respondent, the amendment of the definition of continuous care and treatment contained in section 3 of the Matrimonial Causes Act, 1937, which is important in the case of divorce on the ground of the respondent's incurable unsoundness of mind (*Whitley* v. *Whitley*, [1946] 2 All E.R. 726) and the removal of the bar on marriage with a divorced brother's wife.

It is also suggested that hardship may be occasioned by the rule that proceedings for nullity on the ground that, at the time of the marriage, the respondent was subject to recurrent fits of insanity or epilepsy, suffering from venereal disease in a communicable form, or pregnant by someone other than the petitioner, must, inter alia, be brought within a year of the marriage. It is submitted that much greater hardship may be

occasioned by the retroactive operation of a nullity decree in general, and, in particular, by the fact that non-consummation owing to wilful refusal to consummate the marriage is made a ground for nullity by section 7 (1) (*a*) of the Matrimonial Causes Act, 1937, and not a ground for divorce.

In *Dredge* v. *Dredge*, [1947] 1 All E.R. 29, the respondent was pregnant by the petitioner at the date of their marriage, and the child who was subsequently born was bastardised at the age of seventeen by the subsequent decree of nullity on the ground of the respondent's wilful refusal to consummate the marriage. Had the child been born before the marriage of its parents, it would have been born illegitimate, legitimated by his parents' subsequent marriage and then bastardised by the nullity decree. It seems almost incredible that such things can happen under English law, and the matter should receive attention in the general reconsideration of our divorce laws, which it is hoped will have been stimulated by the interesting work of this committee.

Rupert Cross.

NOTES OF CASES

SIMILAR OFFENCES AS EVIDENCE AGAINST THE ACCUSED

The Indictments Act, 1915, Sched. I, r. 3 permits the joinder of two or more counts in the same indictment where they are 'founded on the same facts or form or are part of a series of offences of the same or a similar character', subject to the power of the trial Judge, conferred by section 5 (3) of the Act, to order a separate trial on each count if the joinder 'may prejudice or embarrass' the accused in his defence. In *R.* v. *Sims*, [1946] 1 All E.R. 697 the accused was charged on three counts for buggery with three different men; three further counts charged him, in the alternative, with gross indecency in respect of the same men; a seventh count charged gross indency with another man; and three further counts alleged indecent assaults on boys. The Judge ordered the seven counts in respect of the four men to be tried together and the point of the appeal was whether this direction was right.

The accused argued for a separate trial on each count, otherwise evidence in respect of the three remaining men would be before the jury in considering the first count when, but for the accident of joinder, it would have been inadmissible. The moral effect on a jury of cumulative evidence in respect of four men is obvious and, though a jury should strictly ignore evidence of the other charges and take each count on its merits, in practice this is asking more than is human, no matter how carefully they are warned in the summing up. This was recognised by the C. C. A. (*ib.*, at p. 699):—

> In such a case as the present, however, it is asking too much to expect any jury, when considering one charge, to disregard the evidence on the others. . . .

But the practice is of long standing; the Act confers a wide discretion on the Judge; the summing up had been impeccable. It would therefore have been open to the Court to dismiss the appeal on the well-settled rule that an Appeal Court will not lightly interfere with a trial Judge's discretion, as in *R.* v. *Grondkowski and Malinowski*, [1946] 1 K.B. 369.

But the C. C. A. went much further and in an attempt to give guidance for the exercise of this discretion

enunciated some novel propositions. There are three rules and these may, it appears, be in opposition: (a) 'all evidence is admissible if it is logically probative'; (b) evidence of conduct on other occasions is not admissible, subject to well recognised exceptions (*e.g.*, such evidence is allowed to prove 'system', intent, fraud or identity, or to rebut the defence of accident or mistake); and (c) evidence of bad character is not admissible unless the accused gives evidence of good character or otherwise as allowed by the Criminal Evidence Act, 1898.

Against this the Indictments Act permits joinder and thus evidence of offence A might be before the jury when considering offence B. In many cases a warning from the Judge will be sufficient, but the difficulty is how and where to draw the line. Otherwise the effect of trying separate counts together will be to make evidence of other offences always admissible and thus a substantive rule of evidence will have been changed by a procedural device. Hitherto Judges have been reluctant to exercise their discretion against a prisoner and evidence under propositions (b) and (c) (above) has been strictly confined to narrow limits.

But what the C. C. A. appears to have done in *Sims' Case* is to have seized upon a *dictum* of Lord Sumner's (*R.* v. *Thompson*, [1918] A.C., at p. 235) and used it as a basis for a general rule on sexual cases. Lord Sumner said—in a case where the point was whether conduct on the 16th inst. was admissible in respect of an offence alleged to have been committed on the 19th and the accused's identity was in issue as, while admitting he was present at the material time on the 19th, he denied he was the man present on the 16th—

> Persons . . . who commit [unnatural offences] seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hallmark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity.

The C. C. A. rationalised this into a general rule—

> On this account, in regard to this crime we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused.

This, it is submitted, is a complete change of ground. Lord Sumner's *dictum* was based on different circumstances—

there, identity was in issue and also the admissibility of indecent pictures found in the accused's rooms. These are admissible but only to show the nature of the accused's interest in other men; *i.e.*, for a reason very similar to that on which evidence to prove intention is admitted in all criminal cases. In *Sims' Case* the 'nature of the act' was never in doubt: the issue was who is telling the truth, the accused or his accomplices? Evidence that only became admissible in the first place because of the Indictments Act, and then only as a side wind to a procedural change, is now being treated as admissible on its own merits—and therefore, presumably, on a single charge where there is no question of joinder—to prove something over which no contest arises. If the accused says his meetings with other men were mere friendship, such evidence might be admitted to prove his homosexual impulses. But where his defence is a flat denial, and no question of the nature of the act arises, the effect of this proposition is to add B's testimony to A's, whereas on ordinary principles the issue is A against the accused, A being the prosecutor or complainant.

And what is the 'hallmark' that stamps men of this tendency? Cannot a habitual offender be stamped with the character of a thief? What of a pyromaniac? Yet nobody has ever suggested that on a charge of larceny or arson, evidence of similar offences would be admissible, except to rebut, *e.g.*, a defence of accident or mistake. If such evidence is admissible at all it is surely the merest technicality to admit it in cases where the evidence discloses two or more offences and yet exclude it where only one offence is charged. In other words unless such admissibility depends on the accident of joining counts in the same indictment the law relating to criminal evidence in sexual cases has been radically altered and this is what appears to have happened.

The C. C. A. stressed that such evidence was admissible because 'logically probative':—

> Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more.

And the repetition of the acts is itself the 'something more'. What becomes of the presumption of innocence if, in considering whether the facts proved in charge A are criminal, the jury is allowed to consider the facts in charge B, on the criminality of which it has not yet made up its

mind? Having used them to find offence A proved, can it then use offence A to assist it in deciding the facts in charge B?

Finally, it is submitted that none of the four cases relied on by the Court was really in point. *R.* v. *Cole* (1810) is not fully reported and only found in text-books, but seems to have turned on the admissibility of statements made by the accused on his arrest. In *R.* v. *Bailey*, [1924] 2 K.B. 300, and *R.* v. *Southern*, 130 L.T. 383, previous Courts had taken, though only *obiter*, a different view and the present C. C. A. was at pains to explain these away. There only remains *R.* v. *Ailes*, 13 Cr.App.R. 173, where, though the point arose directly, it was not fully argued as it was only treated incidentally on an application for leave to appeal. *R.* v. *Bond* was not cited. There it was said:—

> The general rule . . . can be clearly stated. It is that apart from express statutory enactments evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved ([1906] 2 K.B., at p. 394).

In *R.* v. *Southern* (*supra*), Talbot, J., gave a similar warning against such evidence and this, it is believed, correctly states the law and practice. Now the C. C. A. says it is admissible because 'if one starts with the general proposition that all evidence is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence . . . '. It is submitted that both before and after the Indictments Act such evidence was not allowed except to prove intent, system, etc.; and that this rule depends, therefore, largely on the nature of the defence. But apparently what first crept in as a result of change in procedure has now acquired an independent status of its own. Is it really open to any Court to treat well-settled rules like this?

G. A. FORREST.

APPEALS FROM COUNTY COURTS—NOTE OF JUDGMENT

THE decision of the Court of Appeal in *Sims* v. *Wilson*, [1946] 2 All E.R. 261, is noteworthy for drawing attention to the antediluvian methods of obtaining a note of a county court

judgment. The plaintiff had appealed against a decision in a Rent Restriction case, but unfortunately difficulty was experienced in discovering the grounds on which the Judge had based his decision. In these circumstances the Court declared that they should always be provided with as full a note as possible of the county court judgment, and that it is the duty of counsel to take a note of this judgment which should be available to the Court of Appeal if no note has been taken by the Judge himself. If the parties were represented by solicitors and not counsel, then, said the Court, somewhat patronisingly, the solicitors should take 'the best note that they can' and an endeavour should be made to have an agreed note available for the Court of Appeal; failing that, the notes of the respective solicitors should be available.

As a solicitor the writer would be more concerned to resent the suggestion that solicitors are less capable of taking notes than barristers, were he not convinced that this should not be part of the duties of either. Their function is to represent their clients—not to act as the Judge's amanuenses. The client has paid his fees (small though they be in the county court—though less small on appeal) and he is surely entitled to expect that there will be some official record of why the decision was given for or against him?

It is no doubt too much to expect that under present conditions official shorthand writers will be available in county courts, but it should not be impossible for an official to take a brief summary of any judgment delivered which could be subsequently corrected and approved by the Judge and be available if required.

This is, of course, but one example of many of the archaic administrative arrangements of our Courts. These archaisms are even more prevalent in the High Court, much of whose administrative practice is only explicable as a relic of the days when it was one of its functions to provide profitable sinecures for as many officials as possible. The extent to which unnecessary expense and delay is caused in one Division of the Court is shown by the Second Interim Report of the Denning Committee (reviewed elsewhere in this volume). But the Divorce Court is not the sole offender; if anyone doubts this statement he is recommended to start a debenture-holders action.

L. C. B. G.

DIVORCE—CRUELTY

Meacher v. *Meacher*, [1946] 2 All E.R. 307, deserves a brief note not because it decided anything surprising or novel but because it over-ruled a decision of the Judge of first instance that was indeed surprising and novel. The wife had petitioned for divorce on the grounds of cruelty and it was proved that the husband had several times severely assaulted her because of her refusal to obey his order not to visit her sister. Henn Collins, J., while conceding that her refusal was in no way unreasonable, dismissed the petition, holding that the Court intervened only to protect the parties from what they expect to happen and not because of what has happened in the past. In this case the wife could prevent further assaults by obeying her husband and, therefore, was not entitled to relief.

The Court of Appeal pointed out that if this judgment were pushed to its logical conclusion, it followed that a husband might issue unreasonable orders to his wife and beat her if she refused to obey them, and that the wife could not obtain a divorce because she could always prevent further beatings by submitting. They emphasised that the statutory grounds for divorce are 'that the respondent *has since the celebration of the marriage* treated the petitioner with cruelty', *i.e.*, the grounds are past cruelty not expected cruelty. They therefore granted the appeal and made a decree *nisi*, thus removing the gravest threat to married women since *R.* v. *Jackson*, [1891] 1 Q.B. 671.

L. C. B. G.

INCOME TAX LIABILITY OF MARRIED WOMEN

The case of *Nugent-Head* v. *Jacob* (1946), 62 T.L.R. 620, has now been heard by the Court of Appeal, and their reversal of Macnaughton, J.'s, judgment in the lower Court has gone some way towards clearing up the difficulties regarding a married woman's liability for income tax while her husband is abroad. The general rule that a wife's income, for taxation purposes, is deemed to be that of her husband, is well known. Nor are the Revenue adverse to the practise of aggregating the incomes of husband and wife accordingly. Any small income belonging to the wife that might otherwise have escaped appreciable taxation goes to swell the taxable income of her husband, and thus it may become chargeable not only

to the full rate of income tax but also to surtax. But where the husband, though not the wife, is resident abroad, the application of this working rule *simpliciter* would lead to a complete exemption from taxation of both their incomes from foreign sources, and it is in such cases that the Revenue has been disposed to challenge it.

The legal basis of the rule is now to be found in rule 16 of the General Rules applicable to all Schedules of the Income Tax Act, 1918. By this rule:—

> 16. A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried:
>
> Provided that—
>
> (1) *the profits of a married woman living with her husband shall be deemed the profits of the husband*, and shall be assessed and charged in his name, and not in her name or the name of her trustee; and
>
> (2) a married woman living in the United Kingdom *separate* from her husband, *whether the husband be temporarily absent from her or from the United Kingdom or otherwise*, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a *feme sole* if entitled thereto in her own right, *and as the agent of the husband if she receives the same from* or through *him*, or from his property, or on his credit.

It is to be noticed that the general rule we have been discussing appears only as a proviso, proviso (1), to the substantive part of rule 16. The wording of this proviso is perfectly plain: the meaning of the words 'living with' presents the only difficulty. It was held in *Eadie* v. *C. I. R.*, [1924] 2 K.B. 198, that the words cannot include the situation where the parties leave each other because they cannot tolerate being under the same roof. The question has been said to be one of fact (13 T.C. 30, 40, *per* Lord Blackburn) in the Scottish case of *Derry* v. *C. I. R.* (1927), 13 T.C. 30. There the Court of Session upheld the finding of the Commissioners that a wife living in England for the sake of her health while her husband worked in Egypt was not 'living with' him, though they were on affectionate terms and he had visited her during one of the years in question. In *Browning* v. *Duckworth* (1935), 19 T.C. 149, both parties had their permanent home together in

Egypt. Both came home here annually, but the wife remained a month or so longer than her husband on each visit for health reasons, with the odd result that she was found to be resident here while he was not. They were held to be living together. The words have not yet, however, had a full and satisfactory judicial construction given to them.

We come now to the substantive part of rule 16. Read with proviso (1) it amounts to much, but not quite, the same thing as saying that a woman who is *not* living with her husband is chargeable to tax as though she were unmarried. Its curiously limited wording is due to the fact that it was originally drafted, as were also the provisos, during the Napoleonic wars when a married woman's rights of property were also very limited (see Scott, L.J.'s, judgment in *Nugent-Head* v. *Jacob*, at p. 621), and its appearance in the Income Tax Act of 1918 is only its latest re-enactment.

The rule thus stated, together with proviso (1), would be intelligible, but it is proviso (2) that creates the difficulty. 'Separate' is the key word. If this means *not living together* in the sense of proviso (1), then proviso (2) has very little, if any, application. But if it means merely *physically* separate, in the sense of army 'separation' allowances, proviso (2) opens up a whole uncharted sea of income tax law. Where, in circumstances such as *Browning's Case*, the wife here receives an income from her investments abroad, it would be taxable in full if 'separate' had this meaning, instead of entirely escaping United Kingdom taxation on the ground that her husband, being resident abroad, is not assessable to it. If the parties are thus 'living together' but 'separate' in the United Kingdom the wife's foreign income would be taxable in her own name only. It was unnecessary to decide the point in the three cases cited above, though it was considered in *Derry's Case*. In both his and *Eadie's Cases* the spouses were held not to be living together, and the substantive part of the rule covered the situation. In *Browning's Case* the income arose from War Loan interest and proviso (2), which deals only with remittances from abroad, had, therefore, no application. It is curious that the ambiguous wording of proviso (2) should have stood for well over a century without authoritative interpretation.

The relevant facts in *Nugent-Head* v. *Jacob* which has produced the answer were simple. Husband and wife were happily married and had a common home in England; he

went overseas for some years on military duties; she received an income of her own from America. Could it be assessed on her for taxation purposes? The Revenue, not surprisingly, contended that they were living together, although a contrary finding would have brought the substantive part of the rule to their assistance. And they had in fact already assessed a part of the wife's American income that had not been remitted to her on the husband on this very ground. Were it established that separation due to war service prevents people living together within the meaning of proviso (1) the Revenue would stand to lose an enormous sum from those, separated by the force of war circumstances, who would stand to gain by having their aggregate incomes separately charged. And they had *R.* v. *Creamer*, [1919] 1 K.B. 564, to support them, a case on the meaning of 'living with' in section 36 of the Larceny Act, 1916. But, they went on to argue, the couple were 'separate' for the purpose of proviso (2). Macnaughten, J., rejected this argument by which a wife may, at the same time, be both living with her husband and separate from him; on the face of it a reasonable enough approach. It is not difficult to feel sympathy with the taxpayer who is enmeshed in the snares of such a section, and is confronted with such a proposition. But the word 'separate' in proviso (2) is quite plainly qualified by the words that follow: 'whether the husband be *temporarily absent from her* or from the United Kingdom or otherwise'. It is to be noted that *temporary absence from her* is thus listed as the primary example of 'separation'. To construe 'separation' in a wider than a 'merely factual and local' (*per* Scott, L.J., in *Nugent-Head* v. *Jacob*) sense does violence to these qualifying words. It is not therefore surprising that all three members of the Court of Appeal were disposed to reverse Macnaughten, J.'s, judgment on the strength of them.

But if this construction avoids violence to these words, how does it fit in with the rule read as a whole? If living 'separate' and 'living with' are not mutually exclusive, proviso (2) must be construed as a proviso, not to the substantive rule, but to proviso (1). It is clearly drafted, however, as a second proviso to the substantive rule. And another difficulty emerges. If 'separation' in proviso (2) only applies to temporary separations while the partners are still 'living together', what meaning is to be attached to the 'or otherwise' in the qualifying words? If they could

mean 'where the separation was not merely temporary' they would have an intelligible meaning.

Might not the answer be this: that proviso (2) does indeed apply to mere physical separation, whether of a temporary or more permanent character, but that proviso (1) is limited to mere physical living together, and does not apply, for instance, to the situation where a husband is away from his wife for some years on active service. The case in point when the various parts of the rule were originally drafted would be that of a husband leaving the common matrimonial home in England to go to the plantations for some years. The Income Tax Acts were originally intended to be intelligible to the ordinary taxpayer; surely such a case would be better described as a 'separation whether temporary or otherwise' than a 'living together'. If 'living with' and 'separation' are so defined the two provisos become mutually exclusive and the rule can be read intelligibly as a whole.

Such an interpretation might be inconvenient today. 'Living with' has been construed in a wider sense than physical cohabitation in reference to section 36 of the Larceny Act, and there may be other such instances. The Revenue have applied the law of income tax accordingly, especially in the case of the extensive factual separations resulting from the late war. But there is no income tax case, except possibly *Browning* v. *Duckworth*, that would stand in the way of a Court coming to such a conclusion. In my respectful submission this is the only way in which the rule can be intelligibly construed. The Court of Appeal were precluded from settling an authoritative construction of the rule as a whole by the false hypothesis, agreeable to both parties, that Lt.-Col. Nugent-Head and his wife were living together. Even *Browning's Case* could be fitted in with the construction suggested by limiting proviso (2) to separations for a substantial period, say of three months or more.

Another point requires consideration in order to complete this review. Bucknill, L.J., while agreeing with Scott and Somervell, L.JJ., as to the effect of the words qualifying 'separate', based his judgment on the ground that proviso (2) would be 'unnecessary and in effect a mere partial repetition of the general words' if 'separate' were interpreted to mean 'not living with', within the meaning of proviso (1). With the greatest respect it is submitted that there is no substance in this view. Macnaughten, J.'s,

judgment in the lower Court, 62 T.L.R. 66, 68, and Somervell, L.J.'s, in the Court of Appeal give a clue as to the weakness of this argument. For the effect of the last words of the proviso is that money sent to a wife here by her husband abroad, or otherwise separated from her, is to be charged as his income, a case with which the substantive rule does not deal. When it was drafted such money would not be ' property or profits to her separate use '. Nor under the existing law could it be read out of the substantive rule that such payments are to be charged as his income.

It is accordingly submitted, with respect, that while the Court of Appeal's interpretation of proviso (2) is the only one which does not do violence to its express terms, the Revenue's contention that Lt.-Col. Nugent-Head and his wife were ' living together ' within the meaning of proviso (1) was a bad one, and that proviso (2) should be construed as a proviso to the substantive rule, excluding, where it applies, the operation of proviso (1).

The decision opens up considerable opportunities to the taxpayer of cutting down his tax liability where he has a common home with his wife in the United Kingdom, but is temporarily separated from her from time to time. The wife has only to make her receipt of any income she might have from abroad coincide with such separations, apparently, to render such receipts chargeable to tax separately from the remainder of their joint incomes. The Revenue will not like this effect of the decision, if and when the taxpayer begins to profit by it in this way. Considerable legal difficulties arise in such circumstances. If one remittance only is received by the wife during a temporary absence of her husband, how are other such remittances received in the same financial year to be charged? Perhaps the decision will lead to the Revenue displaying some initiative towards the recasting of rule 16. which, in any case, is long overdue.

MASTER AND SERVANT—GENERAL AND TEMPORARY EMPLOYERS

Where a general employer (hereafter abbreviated to G. E.) hires out a servant to a temporary employer (hereafter abbreviated to T. E.), it is a matter of obvious material interest to the respective employers as to which of them is vicariously responsible for the servant's torts. A case of great authority on this topic is the House of Lords decision

in *Mersey Docks and Harbour Board* v. *Coggins & Griffiths, Ltd.*, [1946] 2 All E.R. 345.

The appellants hired out a crane together with a skilled crane driver to the respondent company. Appellants continued to pay N. (the driver), having also the concomitant power of dismissal. An agreement was entered into, stating (*inter alia*) that, 'the drivers so provided shall be the servants of the applicants'. Respondents had full power to tell N. what to do, *i.e.*, where to station the crane, whether to lift or lower the load, swing it left or right, etc., but they 'had no power to direct how the crane driver should work the crane. The manipulation of the controls was a matter for the driver himself'.[1] Under M.'s directions, N. lifted a case of which M. had to note the number and markings. Instead of holding the case suspended, N. negligently swung the case round, pinning and injuring M. The issue was simply, 'whether the driver was acting as the servant of the stevedores or as the servant of the Board *when he set the crane in motion*'.[2] It was held that he was acting as the servant of the Board.

Their Lordships were unanimous that the decision rested upon these two legal bases:—

(1) 'The burden of proof rests on the general . . . employer . . . to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden . . . may come to rest on the hirer who for the time being has the advantage of the service rendered . . . this burden is a heavy one and can only be discharged in quite exceptional circumstances'.[3]

(2) The governing test question is, where does the authority lie to direct, or to delegate to, the workman, the *manner* in which the work is done? Though the agreement between G. E. and T. E. might determine their liability, *inter se*, it was entirely inconclusive as regards the central issue.

A Restatement of Law?

The burden of proof has always rested on the G. E., for he who alleges must prove. As regards the second basis, the primary rule in the old cases has undergone a visible change.

[1] *Per* Viscount Simon, L.C., at 347.
[2] *Per* Lord Macmillan at 349 (italics imposed).
[3] *Per* Viscount Simon, L.C., at 348.

The extent of this change may be best appreciated by examining the development of the pivotal concept of 'control'. Three main stages of growth may, in our submission, be discerned:—

(1) The primitive stage, as illustrated by *Quarman* v. *Burnett*[4]: there, the Court considered 'that person to be liable who stood in the relation of master to the wrongdoer'; and the master was the person who had selected the servant, from the knowledge of or belief in his skill and care, who could remove him for misconduct, whose orders he was bound to receive and obey.[5] In a word, the master-servant relationship was interpreted in a rough, everyday way. The concept of control, with its subsequent distinction between what a man does and how he does it[6] was not yet fully present in the minds of the Judges.[7]

(2) The emergence of 'control' clearly seen in *Donovan* v. *Laing, etc.*[8]: the guiding doctrine was summed up in that case by the words of Bowen, L.J., '. . . by the employer is meant the person who has a right at the moment *to control the doing of the act*'.[9] Reading the judgments in *Donovan's Case* in the light of the facts, we submit with deference that the meaning attached by the learned Judges in *Donovan's Case* to the word 'control', was, 'control of what the servant did' without reference to the subtlety as to how he did it, which was introduced later.[10] Other cases in which this notion of 'control' was applied are, the earlier *Rourke* v. *White Moss Colliery Co.*[11] and the later *Bain* v. *Central Vermont Ry.*[12]

(3) The meaning of 'control' refined; in *M'Cartan* v. *Belfast Harbour Commissioners*,[13] the groundwork

4 (1840), 6 M. & W. 499.
5 *Loc. cit.*, at 509.
6 *Per* Lord Simonds, in the instant case at 352.
7 *Pace* Viscount Simon in the instant case at 348.
8 [1893] 1 Q.B. 629.
9 *Loc. cit.* at 634 (italics imposed).
10 This submission is 'with deference' because of the manner in which the interpretation of the facts by the Court in *Donovan's Case* has been explained by subsequent eminent authorities so as to fit in with the later, more developed definition of 'control'. See, *e.g.*, Lord Moncreiff in *Cairns* v. *Clyde Navigation Trustees* (1898), 25 R. 1021 at 1027 (approved by Lord Skerrington in the *Ainslie Case, loc. cit.* at 681), the Court of Appeal in *Nicholas* v. *Sparkes*, [1945] 1 K.B. at 311; and the House of Lords generally in the case under review.
11 (1877), 2 C.P.D. 205.
12 [1921] 2 A.C. (J.C.) 412; see especially at 416.
13 [1911] 2 Ir. R. 143 (in House of Lords).

was laid by the nature of the Court's assessment of the facts in deciding the question, 'control or no control'; *viz.*, that if the hirer could only tell the hired man when and to what place the crane was to be moved, and when the loads were to be raised and lowered, or, again, where and when to drive the hired carriage, then such facts did *not* amount to control.[14] The modern interpretation of 'control' was clearly rendered in the Scottish decision *Ainslie* v. *Leith Dock Commissioners*.[15] In the words of Lord Mackenzie, '. . . when it came to the *manner* in which the craneman was to do his work, *how* he was to employ his power, *how* he was to use his brake, and *how* he was to manipulate his crane, that was entirely outwith the control of the stevedores'.[16] The legal principle to be applied was, which employer controlled the servant at the time of the tortious act? The answer was a question of fact, and in giving this factual answer the control by T. E. of servant must extend not merely to *what* the servant was doing but, further still, to *how* he was doing it. This distinction was not clearly taken in the later *Century Insurance Case*,[17] but it was taken by the C. A. in *Nicholas* v. *Sparkes*[18] and *McFarlane* v. *Coggins & Griffiths*,[19] and received its final authoritative seal in the instant case in the House of Lords.

Has the law now moved to a fourth stage? This is to say, should we now phrase the main legal principle in such cases to read: Which employer has the power to control, not merely what the servant was doing, but *how* he was doing it? On grounds of convenience, we submit, it should be phrased anew; for, previously, it took the learned Judges two steps of reasoning to reach the applicable test: (1) the major assertion that it was the employer who controlled the servant at the time of the tortious act who was liable; and (2) the defining corollary, that by 'control' is meant, etc. If 'corollary' and 'major assertion' were coalesced to the wording suggested above, the law would gain in

[14] *Loc. cit.* at 145, 146 (Lord Loreburn, L.C.); 146 (Lord Ashbourne); and 149, 150 (Lord Dunedin).
[15] [1919] S.C. 676; the judgment of Lord Mackenzie was followed with approval by Lords Macmillan and Simonds in the instant case, *loc. cit.* at 350, 353.
[16] *Loc. cit.* at 680 (italics imposed).
[17] [1942] A.C. 509.
[18] [1945] 1 K.B. 309 n.
[19] [1945] 1 K.B. 301.

neatness of form, though, it is true, no change in practical effects would now be experienced.

It may be objected that unjustifiable repercussions would be felt on the servant—independent contractor border-land; that to these two categories of persons would be added a third in-between, *viz.*, the person who is controlled as to what he does but not as to how he does it. Such an apprehension would, however, be baseless. The reality of the matter is that this third category can only arise where the G. E.—T. E. situation exists.

Distinguishing between 'How' and 'What' [20]

The neat verbal antithesis employed by Lord Simonds [21] gives a *prima facie* illusion of satisfying finality. Of course, it is a false illusion. The test does not offer a mechanical solution to the diverse factual problems that may occur. Like other tort principles, its form is unavoidably wide,[22] so that, when it comes to detailed application, the concrete facts would, without the intercession of established aids, slip easily through the verbal interstices. For example, in the instant case, if N. had lifted a fragile load too jerkily, surely the respondent firm of stevedores would have been entitled to check him, *i.e.*, to control *how* he was wielding his crane. Yet, on the balance of factors making for and against control, the stevedores were not vicariously liable.

Before considering these influential factors, would a resort to first principles eliminate any difficulties? The starting-point is '*respondeat superior*'. The modern basis for the maxim is two-fold: first, social necessity [23] requires that the financially solvent '*superior*' should pay, and, secondly, it is also just that the '*superior*' should pay, seeing that he derives profit and advantage from the services of the servant.[24] It may be remarked that in the typical G. E.—T. E. situation, both employers would seem to derive profit and advantage from the servant's work. Lord Simonds, in the present case,[25] suggested that the employer at fault should be liable, adding that the G. E. could not escape liability simply

[20] Of considerable value in this respect are the opinions stated in *M'Cartan's Case*, *loc. cit.* at 145, 146, 149, 150, 151 and in *Ainslie's Case*, *loc. cit.* at 683.
[21] Instant case, *loc. cit.* at 352.
[22] See *M'Cartan's Case*, [1911] 2 Ir. R. 143 at 151, where Lord Dunedin makes a similar comment on Bowen, L.J.,'s phrasing of the earlier test in *Donovan's Case;* also Lord Wright in the *Century Insurance Case*, *loc. cit.*, at 515.
[23] *Nicholas* v. *Sparkes*, *loc. cit.* at 310; instant case at 352 (*per* Lord Simonds).
[24] *E.g.*, *Nicholas* v. *Sparkes*, *loc. cit.* at 310.
[25] [1946] 2 All E.R. at 352.

because he had been careful in selecting the servant; which would appear to pluck all meaning from the word 'fault'. What the Courts do seem to have been driving at is that fault is to be found at the seat of control.[26] In short, that employer is at fault, and therefore liable, who controls the servant at the vital time, and 'control' has the sense the House of Lords attached to it; so that the argument fruitlessly turns full circle. First principles, here, merely afford the *raison d'être* for the 'control' concept. They do not carry the inquiry forward.

We have seen that the test-principle laid down by the House of Lords does not solve the 'which employer?' problem in itself. It has the effect of pointing with greater precision than before to the question of fact with which the Court must grapple. Though the Judges have constantly reiterated that each case of this kind must be decided in the light of its own particular circumstances and that a similarity of facts between one case and another is no test,[27] nevertheless they have also asserted that particular factual elements are of consistent importance in deciding the question of control. It may be helpful, therefore, to set out an analysis of those factors which the Courts have noticed.

Factors to be Considered

(1) Who pays the servant[28]—a fact of prime importance (but not, of course, conclusive) in that it underlies the ultimate economic sanction.

(2) Who can dismiss the servant[29]; which follows on (1). In *Donovan's Case* and *Jones* v. *Scullard* the fact that the T. E. could, in the event of dissatisfaction, discharge the servant from the particular employment for which he was engaged, *viz.*, could send the servant back to the G. E., was treated as material.[30]

[26] Cf. *Nicholas* v. *Sparkes*, *loc. cit.* at 310.

[27] *E.g.*, *Century Insurance* v. *N. Ir. Road Transport Board*, [1942] A.C., at 519; also *Ainslie* v. *Leith Dock Commissioners*, [1919] S.C., at 683.

[28] *Donovan's Case*, *loc. cit.* at 632; *Bain's Case*, *loc. cit.* at 416; *Century Insurance Case*, *loc. cit.* at 517; *Bontex Knitting Works* v. *St. John's Garage*, [1943] 2 All E.R. at 692; *McFarlane* v. *Coggins & Griffiths*, [1945] K.B. (C.A.) at 305; instant case, *loc. cit.* at 347, 351.

[29] *Quarman* v. *Burnett*, *loc. cit.* at 509; *Donovan's Case*, *loc. cit.* at 632; *Jones* v. *Scullard*, [1898] 2 Q.B. at 572; *Willard* v. *Whiteley*, [1938] 3 All E.R. at 780; *Century Insurance*, *loc. cit.* at 517; *McFarlane* v. *Coggins & Griffiths*, *loc. cit.* at 305; instant case, *loc. cit.* at 347, 351.

[30] *Pace* Lord Moncreiff in *Cairns' Case*, 25 R. 1021 at 1027, and Lord Simonds in instant case, *loc. cit.* at 352.

(3) How long the alternative service lasts[31]—not an influential factor, though, in *M'Cartan's Case*, Lord Dunedin did suggest a hypothetical situation where the length of the temporary service *might* be a paramount consideration.

(4) Who selected the servant from knowledge of and belief in his skill and care.[32] It is immaterial whether the selection was by the master directly or through an appointing agent.[33] If the T. E. asked for a particular man, there seems to be a conflict of judicial opinion as to the materiality of this fact.[34]

(5) Did the servant wear the T. E.'s uniform during the period of the temporary service?—probably irrelevant, though the interpretation of *Jones* v. *Scullard* by Greer, L.J., in *Willard* v. *Whiteley* leaves a shade of doubt.[35]

(6) What machinery (etc.) was the servant using?—*Semble*: the G. E.'s burden of proof would be easier to discharge if the machinery, vehicle, etc., belonged to the T. E.; harder, though not impossible, where he hires out his servant with his own apparatus.[36] The nature as well as the ownership of the machinery (etc.) seems to make a difference. For instance, crane driving would probably be more susceptible of detailed control than lorry driving.

(7) Was the servant a skilled or an unskilled man[37]?—*Semble*: where the servant is skilled there is less likelihood that the manner of his working will be subject to the T. E.'s control. It may be argued that the G. E. too can in no real sense control the way in which a skilled employee exercises his skill. The answer appears to be that the G. E., by virtue

[31] *Jones* v. *Scullard*, *loc. cit.* interpreted to this effect in *Willard* v. *Whiteley*, *loc. cit.* at 781; *M'Cartan*, *loc. cit.* at 151; instant case, *loc. cit.* at 351.

[32] *Quarman* v. *Burnett*, *loc. cit.* at 509; *Donovan* v. *Laing*, *loc. cit.* at 632; *Century Insurance* v. *N. Ir. Road Transport Board*, *loc. cit.* at 517; *McFarlane* v. *Coggins & Griffiths*, *loc. cit.* at 305; instant case, *loc. cit.* at 347.

[33] *Quarman* v. *Burnett*, *loc. cit.* at 509.

[34] Cf. *Quarman* v. *Burnett*, *loc. cit.* at 508; with *Bontex Knitting Works* v. *St. John's Garage*, *loc. cit.* at 692.

[35] *Quarman* v. *Burnett*, *loc. cit.* at 508; *Willard* v. *Whiteley*, *loc. cit.* at 781. The agreement in *Century Insurance* v. *N. Ir. R. T. B.*, specified that the uniform of the servant was at the discretion of the T. E. This fact was not taken into account at all by the House of Lords.

[36] See the cases generally, more particularly *Bull* v. *W. African etc., Co.*, [1927] A.C. 686; *Leggott* v. *Normanton* (1928), 98 L.J.K.B. 145, and the instant case *loc. cit.* at 351.

[37] See instant case, *loc. cit.* at 354, to which might be related the situation in *Bull* v. *W. African etc., Co.* (*supra*).

of the nature of employment, has the power of vesting in the employee a discretion to exercise his skill in his own trained fashion.

Germane to this factor are the emphatic words of Lord Uthwatt [38] to this effect, that the nature of the activities to be demanded of the workman by the hirer and the relation of those activities to the activities of the hirer's own workmen are of outstanding importance in determining the central question. Unfortunately, his Lordship gave no concrete example in which the relation of activities mentioned would prove ' of outstanding importance '.

(8) Whether the servant is let out for a consideration or gratuitously seems to be immaterial.[39]

(9) An agreement between G. E. and T. E. providing (*inter alia*) that the servant is to be the servant of the T. E. for purposes of vicarious responsibility will not affect the Court's view of the facts. It may be adduced as evidence of the nature of the temporary employment. It may determine the liability of G. E. and T. E. *inter se*.[40] The workman's consent to the transfer is usually assumed. *Quaere*: whether the result would be vitally affected if the servant joined *expressly* in the agreement.[41]

Certain eminent judicial authorities have put forward the opinion that the assumption of a workman's assent to the temporary transfer of service may be undermined by considering the effect of the transfer on the workman's compensation and social insurance rights.[42] The effect hinted at appears obscure in the highest degree.

Conclusion

The results of the foregoing notes may be collected as follows: slight though the practical effect may be, we suggest that there lies implicit in the recent House of Lords decision a restatement of the legal principle governing the G. E.—T. E.

[38] Instant case, *loc. cit.* at 354.
[39] See *Donovan* v. *Laing*, *loc. cit.* at 633, 635.
[40] *Bain* v. *Central Vermont Ry.*, *loc. cit.* at 414; *McFarlane* v. *Coggins & Griffiths*, *loc. cit.* at 308; *per curiam* in the instant case.
[41] See the inadequate remarks of Lords Porter and Uthwatt in the instant case, *loc. cit.* at 350, 354.
[42] *Century Insurance* v. *N. Ir. R. T. B.*, *loc. cit.* at 516 (*per* Lord Wright); instant case, *loc. cit.* at 350 (*per* Lord Porter).

type of case. Even in its supplemented form, the principle serves only to indicate with finer accuracy the question of fact that has to be answered. The question of fact revolves about the distinction between 'how' and 'what'. The drawing of this distinction is not an abstract science; it is an art derived from a detailed consideration of the concrete facts of each particular case. Certain facts, as listed above, are fundamental and of great importance in reaching a final decision.

C. Grunfeld.

WAR RISKS IN MARINE INSURANCE

The two world wars have given rise to much expensive litigation, not the least important of which has been that between marine and war risk underwriters of property at sea. The cases which have reached the House of Lords could hardly be counted on the fingers of both hands, and a substantial number have been expensively litigated without getting so far. Most if not all of this litigation was quite unnecessary, if considered in the light of fundamental social requirements, but it was inevitable on the basis of the mixed system of private enterprise and government control which this country made use of in both struggles.

Maritime war obviously affords a serious peril to property at sea, and particularly to that belonging to the nationals of a belligerent such as Great Britain, whose life depends on her shipping. In earlier times this risk could be effectively covered in the ordinary market, but the great value of the property at risk in a modern war, and the incalculable nature of the peril, resulted at the earliest stage in the first world war in a decision of the government that the State would take the main part of the responsibility for insuring war risks leaving the usual marine risks to the market.[1] The litigation above referred to followed from this decision, for dispute was inevitable as to whether many a given casualty was due to the one type of risk or the other.

From the lawyer's point of view the cases are of great interest in that they involve in an acute form the problem of causation, and it is for that reason that a note on the recent case of *Ocean Steamship Co., Ltd.* v. *Liverpool and*

[1] For a more detailed description, see a *History of Lloyd's* by Wright & Fayle, ch. xxii.

London War Risks Insurance Association, Ltd., [1946] 1 K.B. 561 may be of interest.

The ordinary Lloyd's policy of marine insurance contains a clause excluding war risks, that is the well-known f. c. and s. clause. This has been much elaborated on earlier forms and in the modern Institute Clauses excludes losses which are 'the consequences of hostilities or warlike operations'. Since this is the risk excluded from the cover granted by the normal policy a war-risks policy will grant cover in similar terms, and in cases where a vessel is on charter to the government the charterparty will usually contain a clause framed in like words that the chartering department shall take responsibility for war risks. The cases which have come before the Courts have arisen from all three types of transaction, but the question for decision has always been essentially the same; *viz.*, was the loss a 'consequence of hostilities or warlike operations'.

Curiously enough until the instant case little importance has been attached to the word 'consequences' in this expression. It is true that in the first case in which the clause was discussed, *Ionides* v. *The Universal Marine Association* (1863), 14 C.B. (N.S.) 259, Brett, K.C., in argument drew a distinction between a consequence and an effect, but the Court rather brushed this aside and treated the matter entirely as one for applying the *causa proxima* rule of construction. From that time 'consequent' has been assumed to be the equivalent of 'caused by'; so in *Pink* v. *Fleming*, 25 Q.B.D. 396, where the cover granted was against 'consequences of collision'; and so in the important series of cases arising from the first world war as *The Petersham* and *The Matiana*, [1921] 1 A.C. 99, and so in the authoritative exposition of *causa proxima* in *The Coxwold*, [1942] A.C. 691. The position taken is well summed up by the editors of Arnould's *Marine Insurance*, which is, of course, the leading textbook, when they say of the cases in which this matter has been discussed 'it is established that the rule as to proximate cause applies with equal stringency to these cases, and that the word "consequences" has regard only to the immediate and not the remote causes of a loss'.

It might accordingly seem rather late in the day to suggest a new approach to this matter, but that is what Scott, L.J., has had the ingenuity and boldness to do in the instant case. The cover granted to the plaintiffs was against 'King's enemies' risks and war risks, including the consequences of warlike operations by or against the King's enemies'. The

form of words used in other cases has not been quite the same, cf. *The Coxwold* (*supra*), when hostilities and warlike operations appear in a different clause from the words 'consequences of hostilities and warlike operations', but broadly speaking the object of the draftsman appears to have been the same.

The fact that both war risks or warlike operations and also the 'consequences' thereof appear in the cover has from time to time been commented upon, but it has been rather easily assumed that the draftsman added the latter words *ex abundanti cautela* (cf. *per* Lord Wright in *The Coxwold* at p. 707). It seems more probable, however, that being mindful of the *causa proxima* rule he was deliberately aiming at a wider set of risks than mere war risks. An enemy torpedo is an obvious war risk, but if a vessel after being struck by one goes ashore in only moderately rough weather there may be much difference of opinion as to whether the loss is proximately caused by the explosion of the torpedo (cf. *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Society*, [1918] A.C. 350). If, however, the damage to the vessel can be regarded as caused not by the torpedo but by a consequence of a warlike operation, *i.e.*, the going ashore, then the decision that the war risk insurers must pay is much more easily reached. Certainly the effort to give a common-sense application to the cover afforded by the war risks clause has put a strain upon the *causa proxima* rule from which it may never recover.

In the instant case the vessel carrying important war supplies of a very heavy character, such as a tank bridge layer, was on a North Atlantic voyage during the winter. Heavy weather caused the deck cargo to break loose so that the hatch covers were damaged and the hold became flooded. The master, in order to avoid submarine attack, maintained a zigzag course at a high rate of speed so that more water came into the hold causing further damage.

It was contended on behalf of the war risk insurers that this damage was proximately caused by a normal peril of the seas, viz., the heavy weather and the sea water coming on board. In the view of the trial Judge and of the majority of the Court of Appeal the damage was brought about by the combination of deck cargo, zigzag course and high speed which were the consequences of the warlike operation on which the ship was engaged.

Scott, L.J., however, approached the matter in a somewhat different way. Treating the 'consequences of warlike operations' as a different peril from that of war he found that the breaking loose of the deck cargo, the zigzagging and the high rate of speed were all consequences of the warlike operations upon which the vessel was engaged. The question, therefore, resolved itself into the comparatively simple one whether the damage resulting was proximately caused by these consequences. As regards the deck damage there could be no question. As regards the damage caused by the sea water in the holds, he considered that on the common-sense view of causation which the House of Lords in *The Coxwold* (*supra*) held must be taken in these cases, this, too, could properly be regarded as caused by a consequence of warlike operations.

In Scott, L.J.'s view his reading of the law is in no way inconsistent with the earlier cases, but it must be confessed that not only were these concluded on a different *ratio decidendi*, but that it would appear, to the author of this note at any rate, that if his reasoning had in fact been adopted earlier the decision in *The Matiana*, if not also in *The Petersham* (*ubi supra*) must have been different.

C.

THE ADVANCEMENT OF RELIGION

The intricacies of the law of charitable trusts are well illustrated by the following three rules concerning gifts to the incumbent of a church for the time being:—

1. A gift 'to the vicar of a parish' is a valid charitable trust.

2. A gift 'to the vicar of a parish (for parish work)' does not create a charitable trust and therefore fails for uncertainty.

3. A gift 'to the vicar of a parish for his work in the parish' is a valid charitable trust.

The second rule is explained by the fact that parish work comprises in addition to the strictly ecclesiastical duties of a vicar (which alone are contemplated in the first rule) various benevolent functions which a vicar normally undertakes. In view of the recognised distinction between 'charitable' and 'benevolent' purposes, parish work may thus comprise non-charitable activities.

It might be tempting to confine the privileged character of a charitable trust to gifts *simpliciter* to vicars, but the

decision in *Re Bain*, [1930] 1 Ch. 224, where a gift to a vicar 'for such objects connected with the Church as he shall think fit' was upheld, proves that the addition of directions to the appointment of the trustee cannot of itself be fatal to the trust for the advancement of religion. It must depend on whether these directions enlarge the range of purposes for which the fund may be spent beyond the strict duties of a vicar.

In *Re Simson*, [1946] 1 Ch. 299, a gift 'to the vicar of St. Luke's Church, Ramsgate, to be used for his work in the parish' had to be considered. Mr. Justice Romer construed this direction, as it were, by instalments. He pointed out that if the last nine words had been omitted, the gift would fall under the first of the above three rules and thus be valid. If only the last three words had been omitted, the gift would still be good, the words 'to be used for his work' would be an 'indication by the testatrix *ex abundanti cautela* that the property was not to vest in the vicar for his own personal use'. The last three words 'in the parish' indicated that the gift was not to be employed in the performance of the vicar's strict duties outside the parish. The directions of the testatrix did, therefore, not enlarge but narrowed, in the local sense, the range of permitted purposes. In formal logic, this reasoning may be unobjectionable. There is even a possibility that the testatrix in this case, as distinct from *Re Ashton*, [1939] A.C. 430, where money was left 'for parish work', only contemplated ecclesiastical duties to the exclusion of merely benevolent activities. The distinctions, nevertheless, seem too subtle and the law on this subject unreal.

It may be answered that *Re Ashton* and *Re Simson* are decisions on questions of construction only and that the above three rules are not rules of law but of construction. But this answer ignores the difficulty of separating questions of law from questions of fact or of construction in equity where there is an almost irresistible tendency to treat a decision on a point of construction as laying down a binding precedent. Such decisions are incorporated in expositions of the law and observed in practice. No draftsman would be willing to risk a legacy to a vicar 'for parish purposes' on the ground that *Re Ashton* was merely a decision on a point of construction of the particular will then before the Court, and rules corresponding to those stated at the beginning of this note will be found in most treatises on Equity.

The subtleties of the law on this subject would be swept

aside if the Courts would be willing to abandon the distinction between the ecclesiastical and social duties of ministers of the Church. But this distinction is inevitable as long as the difference between the legal and natural meaning of 'charitable' is maintained, since the social duties of a minister of the Church comprise charitable, in the sense of philanthropic or benevolent, activities to which the privileges of a charitable trust are denied.

Where it is desired to encourage private support for the maintenance of institutions of public utility by various privileges, such as exemption from taxation, it is inevitable that strict tests should be adopted to prevent abuse of these privileges. Hence the distinction between 'charitable' and 'benevolent'. Once it is realised that the community has assumed full responsibility for public welfare, those privileges of charitable trusts which are meant to encourage private bounty become superfluous. The disappearance of these privileges of charitable trusts founded by private bounty removes the need to guard against their abuse and a more liberal definition of charitable can safely be adopted.

This stage has not yet been reached. But the direction in which the institutional life of this country is moving has been clear for some time and the substitution of public for private charity has gone sufficiently far to give an air of unreality to the three rules set out above which reflect the character of a period preceding that of the modern welfare-state.

J. Unger.

RECENT PERIODICAL LITERATURE

Jurisprudence. K. Lipstein: The Doctrine of Precedent in Continental Law with Special Reference to French and German Law, 28 J.Comp.Leg. 34; the author examines the place of precedents in civil law countries and comes to the conclusion that they do not recognise a doctrine of binding precedent because (1) under the influence of Roman law civil lawyers approach their sources in a way different from that to which common lawyers are accustomed, (2) on the Continent the Supreme Courts (*i.e.*, the courts of final appeal) sit in many divisions, (3) there are usually several Courts of Appeal. Benjamin R. Payn: French Legislation in Exile, 28 J.Comp. Leg. 44; the article deals largely with public law, in particular with the problems arising from the fact that the Free French Movement was not a Government in exile like the other Allied Governments established in Great Britain. Pan J. Zepos: The New Greek Civil Code of 1946, 28 J.Comp.Leg. 56. Max Radin: The Trail of the Calf, 32 Cornell L.Q. 137; an article on the doctrine of precedent. Vincent M. Barnett, Jr.: Mr. Justice Murphy, Civil Liberties, and the Holmes Tradition, 32 Cornell L.Q. 177. William N. Wherry: Fee Schedules—a Device in Preventive Law, 21 N.Y.U.L.Q.Rev. 366; the term 'preventive' bears the meaning it does in 'preventive medicine'.

Roman Law and Legal History. L. Radzinowicz: An Early Stage in the Movement for the Reform of Criminal Law, 63 L.Q.R. 94; this is an account of the committee of 1770 and of an attempt to set up a commission of inquiry in 1787. M. W. Thomas: How it Began; the Origins of Industrial Law VII, 1 Industrial Law Review 245. Lionel H. Laing: Historic Origins of Admiralty Jurisdiction in England, 45 Mich.L.R. 163. G. W. Keeton: The Office of Attorney-General (continued), 58 Jurid.Rev. 217. K. Kagan: Res Corporalis and Res Incorporalis—a comparison of Roman and English law of interests for life, 21 Tul.L.R. 74.

Constitutional Law. Bernard Schwartz: The American Administrative Procedure Act, 1946, 63 L.Q.R. 43; the Act is based on the report of the Attorney-General's Committee on Administrative Procedure. The committee dealt with many of the problems examined by the Donoughmore Committee in this country. A. N. Doorly: Native Tribunals, 28

J.Comp.Leg. 25; the author treats the subject on the basis of the report submitted by Mr. Phillips, a Kenya Crown counsel. C. K. Meek: A Note on the Crown Lands in the Colonies, 28 J.Comp.Leg. 87. S. D. Sharma: Applicability of the Doctrine of Extra-Territoriality to Legislation by the Indian Legislature, 28 J.Comp.Leg. 91. Philip C. Jessup: Responsibility of States for Injuries to Individuals, 46 Col.L.R. 903. Robert L. Hale: Unconstitutional Acts as Federal Crimes, 60 Harv.L.R. 65. Foster H. Sherwood: Mandamus to Review State Administrative Action, 45 Mich.L.R. 123. Norman Bentwich: The Judicial Committee of the Privy Council in War, 58 Jurid.Rev. 173.

Administrative Law. Bernard Schwartz: The American Administrative Procedure Act, 1946; see Constitutional Law. Robert S. W. Pollard: Conscientious Objectors in Great Britain and the Dominions, 28 J.Comp.Leg. 72. Russell Gilbert: The Nationalisation of Coal: its history, progress and realisation, 11 Convey.(n.s.) 94. Foster H. Sherwood: Mandamus to Review State Administrative Action; see Constitutional Law. Hans F. Abraham: Public Offices and Public Officers in the United States and in Germany, 21 Tul.L.R. 1.

Family Law and the Law of Persons. R. S. Welsh: Legitimacy in the Conflict of Laws, 63 L.Q.R. 65; the author states at the beginning that he proposes to deal with the question of legitimacy at birth only and not with the topic of legitimation, further that the question has, in the conflict of laws, arisen in connection with problems of succession only. Having examined three possible methods of approach, he comes to the conclusion that the question is one of construction only and ought to be governed by the lex successionis, including the conflict rules of that lex. F. M. Goadby: Change of 'Christian' Name, 28 J.Comp.Leg. 82; the author shows how much easier it is to change one's surname than one's Christian name.

Law of Property and Revenue Law. C. K. Meek: A Note on the Crown Lands in the Colonies; see Constitutional Law. A. Farnsworth: 'Fact' or 'Law' in American Income Tax Law, 28 J.Comp.Leg. 99. Samuel M. Hesson: The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L.Q. 222. E. H. Bodkin: Settlements to Avoid Income Tax, 11 Convey.(n.s.) 81. W. J. L. Ambrose: Notes on the Property Acts of 1925, 11 Convey.(n.s.) 86; the author, a former registrar at the Land Registry, discusses some points

that have frequently arisen in the administration of the 1925 legislation. Dispositions of Settled Land by Personal Representatives, 11 Convey.(N.S.) 91; this is a discussion arising from Professor Potter's article: Rents in the Settled Land Curtain, 10 Convey.(N.S.) 135, and an article in 201 L.T. (Newspaper) 307. Russell Gilbert: The Nationalisation of Coal; its history, progress and realisation; see Administrative Law. John W. Wade: Legal Status of Property Transferred under an Illegal Transaction, 41 Ill.L.R. 487. K. Kagan: Res Corporalis and Res Incorporalis; a comparison of Roman and English law of interests for life; see Roman Law and Legal History. James Quarles: The Cy-près Doctrine: its application to cases involving the rule against perpetuities and trusts for accumulation, 21 N.Y.U.L.Q.Rev. 384.

Law of Contract. P. H. Winfield: Quasi-Contract for Work Done, 63 L.Q.R. 35; Professor Winfield discusses some points in the history and the current law of quasi-contract for work done that, so far, seem to have been overlooked. In volume 28, parts 3 and 4, of the *Journal of Comparative Legislation*, there is a series of articles discussing the treatment of 'frustration of contract' in foreign legal systems: Lord Cooper, Scots Law, p. 1; Professor R. W. Lee, South Africa, p. 5; René David, French Law, p. 11; E. J. Cohn, German Law, p. 15. The series is to be continued.

Law of Tort. Alexander Stark: Newspapers and the Law of Libel, 24 Can.B.R. 861. Philip C. Jessup: Responsibility of States for Injuries to Individuals: see Constitutional Law. Zechariah Chafee, Jr.: Possible New Remedies for Errors in the Press, 60 Harv.L.R. 1; the article will form a chapter of the author's forthcoming book on 'Government and Mass Communication', which is based on the work of the commission on the freedom of the press (the term 'press' covering broadcasts and motion pictures); the author examines the possibility of a criminal statute punishing inaccuracies and that of compulsory correction. He adds a warning that the true remedies must be extra-legal.

Mercantile Law. Samuel M. Hesson: The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations; see Law of Property and Revenue Law.

Industrial Law. Gertrude Tuckwell: The First International Labour Association; the passing of the British section, 28 J.Comp.Leg. 53. M. Cecile Matheson: Labour Conditions

in South Australia, 28 J.Comp.Leg. 96. M. W. Thomas: How It Began; the origins of industrial law VII; see Roman Law and Legal History. Henri Binet: International Labour Legislation, 24 Can.B.R. 847; the article discusses the International Labour Organisation in detail and also international labour legislation which preceded its establishment. Harold J. Clawson: The Rand Formula: Subsidiary and Quasi-Legal Aspects, 24 Can.B.R. 879; the formula in effect decides that all employees in a bargaining unit to which it applies must pay membership dues whether they are members of the appropriate union or not. Ludwig Teller: The War Labour Board and Management Functions, 21 N.Y.U.L.Q.Rev. 319. G. W. Keeton: Industrial Arbitration by Legal Process in Australia, 1 Industrial Law Review 236.

Law of Evidence. Arthur John Keeffe, Torrance Brooks and William J. Greer: 86 or 1,100?, 32 Cornell L.Q. 253; the article discusses the rule-making power of the New York Court of Appeals. W. Jardine Dobie: The Application of the Rule in Moorov, 58 Jurid.Rev. 201; this is one of the rules governing inter-corroboration in the case of repetitions of the same crime.

Criminal Law and Procedure and Criminology. L. Radzinowicz: An Early Stage in the Movement for the Reform of Criminal Law; see Roman Law and Legal History. A. G. P. Pullan: Trial by Jury in India, 28 J.Comp.Leg. 104. Stuart K. Jaffary: Saskatchewan Examines Penal Reform, 24 Can.B.R. 908; the proposals related are strongly influenced by the findings of sociologists. Robert L. Hale: Unconstitutional Acts as Federal Crimes; see Constitutional Law. Paul W. Tappan: The Adolescent in Court, 37 J.Crim.L. 216. John C. Gardner: Inquiry into Sudden Deaths in England and Scotland, 58 Jurid.Rev. 209; the author describes the Scottish system of private inquiry and its advantages.

Civil Procedure. Arthur John Keeffe, Torrance Brooks and William J. Greer: 86 or 1,100?, see Law of Evidence.

Conflict of Laws. R. S. Welsh: Legitimacy in the Conflict of Laws; see Family Law and the Law of Persons. B. A. Wortley: Some German Views on the Conflict of Laws, 28 J.Comp.Leg. 109; in the present article the author reviews the recent books by E. Rabel, C. M. Schmitthoff and M. Wolff.

International Law. Francis O. Wilcox: The United States Accepts Compulsory Jurisdiction, 40 Am.J.Int.Law 699; this

is a discussion of the Morse Resolution and the American submission to the compulsory jurisdiction of the International Court of Justice. Lawrence Preuss: The International Court of Justice, the Senate and Matters of Domestic Jurisdiction, 40 Am.J.Int.Law. 720; the author discusses the Connally Amendment to the Morse Resolution which excludes matters essentially within the domestic jurisdiction of the United States, as determined by the United States, from the scope of the resolution. Jasper Y. Brinton: The Egyptian Mixed Courts and Foreign Armed Forces, 40 Am.J.Int.Law 737. Eugene A. Korovin: The Second World War and International Law, 40 Am.J.Int.Law 742. Philip C. Jessup: Responsibility of States for Injuries to Individuals; see Constitutional Law. 20 Temple L.Q. No. 2 contains reprints of the judgment of the international military tribunal against major Nazi war criminals and criminal organisations, of the dissenting opinion of the Soviet member of the tribunal, and of Justice Jackson's final report to the President concerning the Nuremberg war crimes trial. Henri Binet: International Labour Legislation; see Industrial Law. Majid Khadduri: The Arab League as a Regional Arrangement, 40 Am.J.Int.Law 756.

W. A. Steiner.

REVIEWS

CONSTITUTIONAL LAW. By E. C. S. WADE and G. GODFREY PHILLIPS. (London: Longmans, Green & Co. Third Edition. 1946. xxv and 474 pp. 25s.)

THE authors are to be congratulated on the considerable improvements which the third edition of this textbook shows over the previous editions. They have been wise in their decision to rewrite much of the text rather than to make numerous insertions which, because of the volume of new material, would have rendered the book awkward to handle. As it is, the book is well arranged and convenient to use for reference. The extent of new material can be measured by the fact that of the six pages of statutes from A.D. 1101 to 1945 one is needed for the years 1939 onwards. So many and various are the changes of that period that it is specially valuable to have them properly included. It is to be hoped that the authors will continue to keep the work up to date. The improvement is also due to an ampler treatment of that field of general principles and of the working machinery of government which links the legal with the political science aspects of the subject.

The book is appropriately described as an outline of the law and practice of the constitution. It deals with general principles such as the separation of powers, Parliamentary supremacy, and the conventions of the constitution. It also covers Parliament, the Executive, the Judiciary, Local Government, Administrative Law, the British Commonwealth and Military Law. There are chapters on freedom of the person and of discussion, emergency powers, Church and State. Useful appendices are given on legislative forms and the forms of statutory orders.

Two dilemmas face the authors of a book of this character. One is how to be adequate without being exhaustive. This has been well met, although the chapter on the civil service might be expanded. The other is how to deal with matters which are the outcome of dynamic social forces, and which historical treatment shows to be subject to tendencies of development or change, without entering too much into their history or attempting that description of economic and social background sometimes necessary for their full understanding. This also implies a selection of facts in more than a narrowly legal perspective. The section on independence of the judiciary, which gives the bare legal facts without mentioning that party leaders in the guise of Ministers make the appointments,

illustrates the difficulty. The student of government needs to know those facts, but cannot be content with them. In giving them, this books performs a service to him as well as to the student of constitutional law, always assuming that neither regards the outline as the whole flesh and blood of the constitutional body.

H. R. G. Greaves.

The Education Act, 1944. By Alfred E. Ekin, b.sc., ll.d. (London: Pitman. 1944. xxxviii and 396 pp. 30s. net.)

This work is a reprint of the Education Act, 1944, 'with explanatory notes'. It also reprints selected sections of other Acts, which the author hopes 'may be helpful in getting to understand the references thereto' in the main Act, certain official circulars, and extracts from the author's previously published articles on education. An unusual feature of the commentary on the Act is the reproduction of passages from the Parliamentary debates relating to particular sections. It is hardly necessary to dwell on the dangers in a legal work of such a method of explaining statutory provisions, but it may be doubted whether it is any more desirable or useful in a work intended primarily for administrators. It is rightly stated (at p. 246) that 'many of the interpretations or definitions given in this section 114 will be found to be of great assistance in the interpretation of various sections of the Act'. The key to the understanding of a long and complicated Act is frequently to be found in the interpretation section, and for this reason it is regrettable that the reader is not assisted by constant cross-references to it in the notes on the sections. The vitally important amending Act of 1946 came too late to be noticed, but this is often the result of producing a commentary hot on the heels of new legislation. One advantage of an author's taking time to consider is the opportunity thereby afforded of incorporating the amendments which frequently have to be made shortly after the coming into force of a major reform.

W. H. D. W.

Wurtzburg's Law Relating to Building Societies. Ninth edition by G. W. Knowles, m.a., Barrister-at-Law. (Stevens, and Sweet & Maxwell. 1946. xxx and 393 pp. 25s. net.)

This is a new edition of a book useful to building societies' officials and lawyers engaged in building society work. Its principal advantage is that it gathers together in handy form

the various statutes and regulations concerned; indeed, no less than 135 pages are taken up with appendices of statutes, regulations and forms. On the other hand the lawyer who turns to it for guidance on detailed points of difficulty (*e.g.*, under the Building Societies Act, 1939) is likely to find it less satisfactory.

The main alterations in the new edition are separate chapters on Additional Security and on Unions and Transfers of Engagements, and the arrangement of the chapters has been improved. In revising the text the editor appears to have overlooked that the Middlesex Deeds Registry is happily now defunct (p. 131).

The Mystery of 'Peter the Painter'. By J. P. Eddy, K.C. With a Prefatory Note by Eveleigh Nash and a Foreword by Sir Philip Gibbs. (Stevens. 1946. 32 pp. 3s. net.)

This is a very short description of an interesting chapter in London's history—the Sidney Street siege. It adds little—except some photographs—to our previous knowledge or to Mr. Winston Churchill's well-known account.

Comparative Law. An Introduction to the Comparative Method of Legal Study and Research. By H. C. Gutteridge, K.C., Bencher of the Hon. Society of Lincoln's Inn, etc. (Cambridge University Press. 1946. xvi and 208 pp. 12s. 6d.)

It is undisputed that comparative legal studies have for long been neglected in this country. It is less clear what the reasons for this neglect are. The legal literature of the seventeenth and eighteenth centuries shows that the peculiar character of the English legal system, and the differences between this system and the contemporary civil laws, might have encouraged rather than impeded comparative research. It is possible that the lack of comprehensive treatment of the functions and the value of comparative jurisprudence has been one of the causes. If this is so, Professor Gutteridge's masterful summary of all that can be said on these two correlated topics should remove at least one of the stumbling blocks. No more powerful incentive to comparative legal studies could have been provided than this book into whose pages are crammed the wisdom and experience of one of the most distinguished legal scholars of our times.

This book is a book on comparative law—it is not a comparative law book. Its aim is not to compare English legal institutions with the legal institutions developed elsewhere. It seeks to clarify the methodological aspects of comparative

studies and to ascertain the function that the results of such studies can perform in the fields of legal reform, legal research and legal education. It answers the question why comparative jurisprudence is a useful tool of legal science and how research in comparative jurisprudence must be conducted. No more appropriate subject could be found for the first volume of the new series of *Cambridge Studies in International and Comparative Law.*

Professor Gutteridge rightly considers comparative law as a method of study and not as a distinct branch of law. Every branch of the law can be studied by the comparative method. Comparative jurisprudence differs from other approaches to law not by the topic which it investigates, but by the method which it uses to investigate the same topics that other branches of legal science investigate. Whether one calls the specific approach of the comparative lawyer a science or merely a method, is of little importance. The author subdivides comparative law into descriptive and applied comparative law. The former comprises comparison for the purpose of providing information only, such as tabular or parallel statements of certain branches of law. The *collatio Mosaicarum et Romanarum legum* is one of the oldest and Magnus' *Tabellen zum International Recht* one of the latest examples of this type of comparative research. Applied comparative research on the other hand denotes the deeper analysis of differences, made with a definite scientific or practical purpose. Professor Rabel's *Warenkauf* or Professor David's study on the Law of Arbitration constitute examples of this branch of comparative legal studies. There have been many similar attempts at subdividing the province of comparative law. Although they were sponsored by names like those of Lambert and Wigmore they have failed to find universal recognition. It is doubtful whether the author's categories will meet with a better fate. What he styles descriptive comparative law is little else than comparison applied either to very simple subjects or in a very elementary manner. Applied comparative law, on the other side, is comparison carried out with all the resources that scholarship offers. The difference is one of object or one of degree. To make it the basis of a methodological distinction is as little possible as it would be to derive a similar subdivision from the difference between *Everyman's Lawyer* and Pollock's *Law of Contracts.* Not infrequently it will be necessary to make a further distinction. Many works belonging to the category here styled ' applied comparative law ' are in effect studies in which the comparative method has merely furnished the material for conclusions, while the conclusions themselves are drawn by different methods. These methods may belong to

the field of legal history, legal sociology, analytical jurisprudence or—last, not least—of legal deontology (often and perhaps better designated as 'critical jurisprudence'). It is important not to overlook this distinction, because the degree of certainty of the results that can be obtained depends upon the method that is applied.

It is a common fault of specialists and pioneers that their enthusiasm for their particular type of work leads them to attaching an importance to it which it does not deserve. Nothing in Professor Gutteridge's book exposes him to this reproach. No more restrained and no more convincing appraisal of the value of comparative law can be imagined than his. If he can be said to have erred at all he has done so in understating rather than in exaggerating the value of the method for which he pleads. The understatement, it is submitted, can be found in two respects. Comparative law in the humble opinion of the present reviewer can be usefully extended to topics in respect of which Professor Gutteridge is unduly sceptical and it can be made useful for at least two more purposes than he has mentioned. Examples for the first of these propositions are comparative investigations of contemporary methods of transfer and hypothecation of immovable property or of contemporary family laws. Practitioners who specialise in international legal relations are not infrequently forced to investigate questions of this kind. They are only too grateful for any help that the comparative scholar can give them. The scientific interest of such topics has been proved *inter alia* by Hedemann's work on the Central European systems of land transfer. The second proposition is borne out by the need of comparative legal work in the service of international administrations and of military governments in occupied territories. The necessity of providing an international civil service for the administrative tasks of UNO is now often discussed. If there is to be a legal branch of this service, its members will have to be trained in the methods of comparative law: otherwise none of them will understand the language which his colleague speaks. Even more pressing is the need for comparative lawyers who can serve with military governments in occupied countries. It is no overstatement to say that anybody who is not to some extent a comparative lawyer will do more harm than good in the services of the legal service of such a government. It would be easy to give a long list of the blunders that have resulted wherever an occupying power has failed to understand the nature and functions of the law of the land which it was administering.

The author's chapter on 'Comparative Law and Legal Education' furnishes the answer to the question how such

blunders could be avoided. The author agrees with Professor Lee in calling the neglect of comparative legal studies in this country ' shocking '. Nobody who has had an opportunity of observing the consequences of such neglect will blame him or Professor Lee for using too strong a term. If it is desired to supply the international civil service with British personnel and if the need for military government staff should continue for several decades, it will clearly be necessary to do something about it. The least that such teaching could achieve would be to make students conscious of the necessity of paying due regard to foreign legal sentiments and foreign legal institutions. Advice on the individual foreign law can, of course, not be rendered unnecessary. But he who has studied comparative law will at least be aware of the necessity of asking for such advice, and capable of understanding and using it.

There remains the question, how comparative studies are best conducted. The author points out that, however well Roman law may lend itself to comparison with certain aspects of English law, much is to be said for extending the comparison to modern law. It is unfortunately true that just those aspects in regard to which Roman law lends itself best to comparison with English law have been discarded by the modern civil law systems. On the other hand the historical and often classicistic bias of nearly all contemporary textbooks of Roman law has done much to making Roman law a dead subject to modern law students. One wonders whether a textbook on Roman law—alas, not yet written!—which would, like Sohm's unsurpassed *Institutions*, carry the tale down to our own times, and do so on a comparative basis, could not provide more inspiration. If comparative law is ever to obtain a firm foothold in modern universities and at the same time the study of Roman law be given back the place that it deserves, this can only be achieved by extending and transforming the Roman law course into a course which on the basis of Roman law introduces the student to the fundamental ideas and conceptions of the contemporary civil law systems.

No less urgent than the provision of some undergraduate introduction to comparative law is the creation of facilities for research and post-graduate studies. The once splendid Berlin Institute of foreign and international private law has found a refuge at Tübingen in the French Zone of Occupation. While conditions in Germany are what they are now, it is, however, only too clear that its activities will for long not be resumed in their former strength. The work which a central information and research body for the British Empire could do, cannot be done by even the best Continental scholar-

ship. The absence of means for obtaining information in this country leads day after day to unnecessary delays and to considerable expenditure abroad. The author's plea for an improvement in this field, above all for the creation of a catalogue of foreign law books available in London, is unanswerable.

More disputable is the scheme, eloquently defended by the author, of an international legal dictionary. Nobody who has to do comparative research work for practical purposes would not wish that such a work would exist. But could it exist? It is submitted that a dictionary, *i.e.*, a 'book of words', would not do. It serves no purpose to 'translate' the English term 'self-government' by the German 'Selbstverwaltung' or the Swiss 'Juge de Paix' by the English 'Justice of the Peace'. It is true, there is no better 'translation', but the fact is that a translation as such does not help. Sometimes the same word in the same language has a different meaning if applied to two different legal systems. Guardianship in Roman-Dutch law does not at all mean the same thing as guardianship in English law. Pflichtteil in German law is something very different from Pflichtteil in Swiss law. The problem, it will be seen, is not one of rendering words. It is one of comparing conceptions. Only an encyclopedia can solve this task. An encyclopedia, on the other hand, could hardly be international. It is already a gigantic undertaking to write a comparative legal encyclopedia for lawyers belonging to one specified system of laws, as was the German *Rechtsvergleichende Handwörterbuch* in seven volumes. The day when a similar work could be produced for the use of English-speaking lawyers is probably not very near: research facilities in this country and the lack of trained staff would constitute formidable obstacles.

No comparative lawyer can fail to be interested in the problem of the unification of law. Nearly one-fifth of this book is devoted to it. The author's attitude is one of sound and realistic scepticism. He is in favour of the movement for the unification of private law. But he warns against undue haste, against immature schemes, against unjustified optimism. The development which the various movements for the unification of certain branches of law have taken in the inter-war period strongly supports these warnings. A proper appreciation of the existing difficulties contributes more to the promotion of international understanding than does the disappointment which follows where it has been lacking. The author explains lucidly and convincingly the particular obstacles which have in the past more than once prevented the common-law countries from joining international

unification conventions. Perhaps the most interesting part of the book is the last chapter, which contains a critical description of the 'mechanism of unification'. The author here enters virgin soil. His studies form an indispensable supplement to Sir Courtenay Ilbert's work on the mechanism of legislation. It is to be hoped that his wise hints and warnings, given with a frankness that is unfortunately only too rare in legal literature, will not fall on deaf ears.

Professor Gutteridge has enriched English legal literature by a book of unusual interest. In the history of comparative law in England this work may well become a landmark. There is one point in respect of which it requires supplementation: the author has thought fit to omit every reference to his own pioneer services in the development of comparative studies in this country. One can only wish that his book may be read even by those who do not yet know that during the last twenty-five years most of the inspiration and a great deal of the spade work in this field have come from him. This book is based on a number of essays published by the author at various times in legal periodicals here and overseas. But there is a considerable number of other essays from his pen which are still scattered over law journals and 'Festschriften' all over the globe. We need not only a book *on* comparative law. A first-class English book *of* comparative law—not a mere introduction to one specified foreign legal system—would be a boon to those who intend to study comparative law. If the author would follow up his present work by a collection of his more important essays on individual topics of private and commercial law, he would provide a supplement to his present work which many of his readers will greatly desire to possess.

E. J. Cohn.

Pollock's Principles of Contract. Twelfth edition. By Professor Winfield, K.C. (London: Stevens & Sons, Ltd. xl and 602 pp. 40s. net.)

Another edition of Pollock's *Contracts* has been called for after a lapse of only three years since the last revision, and everyone will be glad that Professor Winfield has been able, for the second time, to bring the work up to date. He has, rightly as we think, adhered to his decision to reprint Pollock's own language *in toto*, placing the necessary alterations and additions, whether in the text or in the footnotes, in square brackets. It is unnecessary to say that the work remains, as it always has been, indispensable to the serious student of

the law of Contract, and this review will be confined to the changes made since 1942.

Of the additions, the most important is the new section 14 on Remedies for Breach of Contract. It is curious that Pollock entirely omitted this topic, especially as he dealt with Remedies in the companion volume on *Torts*: it has always been, as Professor Winfield says, a serious gap. We are glad to find that Professor Winfield takes the orthodox view that *Hadley* v. *Baxendale* comprises two quite distinct rules (as a matter of fact, he divides the second rule, as to contemplated damages, into a positive and a negative rule). He cites with approval the well-known statement of Bowen, L.J., in *Cobb* v. *G. W. Ry.* (the words, of course, are Bowen's, not Lord Sumner's, though the text suggests that they were the latter's: all that Lord Sumner did was to express, in *Weld-Blundell* v. *Stephens*, his agreement with Bowen's remarks). Lord Phillimore's summary in *Re Hall and Pim* might also have been quoted in this connection. Professor Winfield also agrees, rightly we think, that *Re Polemis* applies to contract as well as to tort: this seems to indicate that, in spite of what he has written in his *Textbook of Tort* (2nd ed., pp. 80, 81), he is now prepared to equate the rule in *Re Polemis* with the first rule in *Hadley* v. *Baxendale*. We hope that this is so, for, as Lord Porter wrote (5 Camb.L.J. p. 190): ' To the practical lawyer it would be inconvenient and to the layman, I imagine, incomprehensible, that the same act should give rise to a totally different measure of damages according to whether the cause of action could be founded in contract or in tort.' It goes without saying that Professor Winfield's exposition of the law is as lucid and forceful as it always is.

A considerable amount of rewriting has naturally been necessary on the topic of frustration: this will be found at pp. 247–251, under the heading ' Adjustment of rights and liabilities of the parties to a frustrated contract '. Here Professor Winfield sets out the facts and decision in the *Fibrosa Case* and most of the clauses of the Law Reform (Frustrated Contracts) Act, 1943. We should have liked to have known whether he shares our astonishment that the House of Lords, in the *Fibrosa Case*, decided that the English common law was in such an appalling condition that it required immediate amendment by the Legislature. It has always seemed to us that there was more common sense in the result reached in *Chandler* v. *Webster* than in the law as declared in the *Fibrosa Case*, and it is remarkable that the commercial community took the same view in establishing the ' custom ' that advance freight is not repayable upon frustration. Nor does Professor Winfield explain what the House of Lords meant in saying that there was a total failure of consideration in the

Fibrosa Case when ' considerable work ' had been done by the defendants upon the machines. And is it still true to say, as the text states on p. 236, that the dissolution of a contract by frustration does not affect any specific right already acquired under it? That is surely precisely the doctrine that was negatived by the House of Lords. Again, even if *Whincup* v. *Hughes* and *Ferns* v. *Carr*, both cited as authorities, can survive the *Fibrosa Case*, they seem to be overruled by the 1943 Act, s. 1 (2). We hope that Professor Winfield will one day help us to unravel these and similar difficulties which are now inherent in this branch of the law.

In perusing the book, a few points occurred to us, which we will note here. On p. 83, *Danziger* v. *Thompson* (and the discussion of the case in 61 L.Q.R. 130) might have been noted. *R.* v. *Cory Bros.* is cited (p. 94, n. 8) for the proposition that a corporation cannot be indicted for manslaughter, but in *R.* v. *I.C.R. Haulage, Ltd.*, [1944] K.B. 551, 556, the Court of Criminal Appeal said that, ' if the facts of *Cory* came before the Court today, the result might well be different '. It is interesting to read Pollock's remark that ' a corporation cannot commit a real crime ', but can it be maintained that this is still the law? If so, many of us will have to rewrite our lectures, which we have only just altered in deference to the Court's views in the *I.C.R. Haulage Case*. On p. 110 we were puzzled by the footnote 26^{a}, which refers to R. S. C., *Crd.* 3 and *Crd.* 15 : for these read *Ord.* in each case. On p. 114 a line has dropped out of the text four lines from the bottom of the page. Something has gone wrong with the note on p. 60 : the reference here should be to 58 L.Q.R. 82–95 ; the note at 51 L.Q.R. 270 deals with *Roberts* v. *Gray* and should be inserted on the following page. The extract from the Digest on p. 237, note 95, prints ' cupla ' for ' culpa ', and a comma is misplaced.

The printer, in setting up his new and very legible type, has done some curious things. The division into Chapters has disappeared : we must now refer to ' 12 ' instead of to ' Chapter 12 '. ' Agreement and Promise ' on p. 2 is in heavy capitals ; ' Revocation ', p. 20, is in a smaller fount. ' Conditions of Offer ', p. 21, is in large but unleaded capitals ; ' Limits of Revocation ', p. 22, should be similarly magnified. ' Infants ' on p. 46 is in very small capitals ; the other persons enjoying a special status, Married Women (p. 65), Lunatics (p. 73), Convicts (p. 77), are dignified with heavier type. And Mr. Hamson, on p. 399, n. 19, has become Hansom : is this the result of four years in a prison camp in Germany?

P. A. Landon.

Judicial Decision and Practical Judgment. By Morris Gall. (New York: Kings Crown Press. England: Oxford University Press. 95 pp. 10s. net.)

In this interesting essay Mr. Gall sets himself to investigate the relationship between the judgments of Courts of law, and the practical judgments of everyday life. He comes to the conclusion that there is no fundamental difference between them, and deduces from this that by training himself, of course within reasonable limits, to come to his decisions upon judicial lines the ordinary citizen will much improve the quality of his judgment, and thereby add to the progress of mankind.

The process of the investigation is of considerable interest to lawyers because Mr. Gall derives his thesis from an analysis of the methods of Justice Holmes, and is considerably influenced, perhaps too much so, by Jerome Frank and the realists. Although he does not throw any new light on the work of the great jurist he gives a succinct and very readable account of his philosophy and methods which should be of particular value to the average reader in this country. Holmes recognised that judicial decisions give effect to the successful among warring social forces, and much of this essay is concerned with the analysis of the process. Many of the more momentous decisions of practical life result from similar conflicts of interest, but it may be doubted whether a training in judicial methods is of much assistance to the statesman who is concerned to make them. Indeed, whether or not the lawyer who has taken to public affairs makes a success of his work seems to depend largely upon the chance of his possessing other qualities than those which brought him to the front as a lawyer.

In the small everyday affairs of life, and indeed in many of the most momentous ones, the need is for rapidity of decision, a quality not called for from judges. Indeed, the emphasis placed upon a careful pondering of all the relevant facts before a judicial decision is reached may positively disqualify the judge from being an effective statesman, if and when he enters the field of politics. Mr. Gall is so much absorbed in the theory of judicial decision that he is apt to overlook practical considerations of this type. In the end, therefore, one suspects that no very valuable outcome results from what is certainly an interesting disquisition.

C.